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IN BRIEF

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This is the first annual Index of **In Brief**. All cases discussed in Volumes 1 through 4 of **In Brief** are included. Cases are indexed under general headings with a brief statement of the legal issue involved. Decided MSPB, FLRA, and Federal court cases are marked with an asterisk (*).

The second annual index of **In Brief** is expected to be distributed in July of 1981.

In Brief is published quarterly by the Office of General Counsel, Office of Personnel Management, for the purpose of informing agency General Counsels and their staffs of the latest developments in federal personnel law. The publication sets forth matters before the Merit Systems Protection Board and the Federal Labor Relations Authority. In addition, **In Brief** follows significant personnel matters in the Federal courts. Material concerning issues/cases before the FLRA is supplied by the Office of Labor Management Relations of the Office of Personnel Management.

In Brief welcomes your comments and suggestions.

United States Office of Personnel Management

Alan K. Campbell, Director
Jule M. Sugarman, Deputy Director

Office of the General Counsel, Margery Waxman, General Counsel

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*Decided MSPB, FLRA, and Federal court cases.

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Volume 1, No. 2, January 1980

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Editor's Note: In answer to a reader's suggestion, **In Brief** is inviting agencies to submit personnel questions to the editor. We will publish selected questions and answers which have government-wide significance and which are deemed to be useful to other agencies. **In Brief** also welcomes letters and suggestions designed to improve the publication.

United States Office of Personnel Management

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PM 132.

MSPB Cases

Decided Cases

Performance Related Cases

Requirement for Performance Based Actions

The recent decision by MSPB in Wells v. Harris will have significant implications for the federal work force and the Civil Service Reform Act (CSRA). A careful reading of this decision makes it clear that, despite the way in which it has been reported, the substantive findings represent a significant victory for Government managers and for the reform effort.

In Wells, the Board made five holdings:

(1) It adopted the argument urged by OPM and other agencies and departments, that performance standards and critical elements must be job related and need not be identical for employees operating under the same position description. Moreover, the Board also agreed with OPM and the agencies that the CSRA did not require the development of elements and standards on a centralized basis. This holding means that agencies can establish critical elements and performance standards based on the actual work performed by each employee and may develop these standards and elements on a regional or subagency basis.

(2) The Board also held that Congress did not intend to allow agencies to take actions under 5 U.S.C. 4303 until they had established appraisal systems under 5 U.S.C. 4302. This holding will temporarily delay agency use of the streamlined Chapter 43 procedures in taking actions against poor performers. This delay, however, should be minimal because the Board has provided that an agency has developed "a system" for purposes of taking Chapter 43 actions when there is OPM approval of that system. In 5 CFR 430.202 and 206, information is set forth which agencies must supply in order to have their plan for implementing a system approved by OPM. A number of these system plans have already been approved by OPM. The plans may cover either an entire agency or a component of the agency as provided by OPM.

(3) The Board also ruled that an agency can begin to use Chapter 43 to take actions against poor performers without showing that it has used the results of the appraisals for the other types of decisions such as promotions and training specified in 5 U.S.C. 4302. The agency must show only that its plan explains how these decisions will be linked to appraisals. Moreover, the Board provided that a system could be developed at different times for employees doing different jobs in the same unit or for employees doing the same job in different units as long as the overall plan is approved by OPM. Agencies, however, may not single out a particular employee, provide only that employee with critical elements and performance standards and act against that employee.

(4) The Board ruled that Chapter 75 could be used for "performance-based" actions provided the agency met old standards of review. Thus, if agencies have not had their plan approved and have not developed critical elements and standards, they may use Chapter 75 to remove or demote poor performers.

(5) The Board determined that in order to show that an action should be overturned because a prohibited personnel practice had occurred, it must be demonstrated (1) that the alleged prohibited personnel practice is a violation of a law, rule, or regulation; (2) that the law, rule or regulation allegedly violated implements or directly concerns a merit system principle; and (3) that the violation was harmful. A mere technical violation cannot be used to reverse an agency action. The future effect of this

holding is extremely significant because it reinforces the harmful error concept adopted by Congress.

Thus, the decision in Wells v. Harris, as a whole, is extremely favorable to the Government. It will greatly facilitate the ability of agencies to establish performance appraisal systems that meet their needs and are tailored to the work actually performed by each employee. Revised regulations are being drafted to reflect MSPB's decision. Wells. Paul Trause: 632-5506; Ann Allen: 632-5421.

Prohibited Personnel Practices

Reassignment as a Prohibited Personnel Practice

In a case involving the reassignment of a group of employees, the MSPB has taken the first step in delineating the scope of protection afforded employees from reprisals for "whistleblowing" or exercising appeal rights.

The Special Counsel had petitioned the Board for corrective action against an agency, alleging it committed prohibited personnel practices in reassigning four employees to offices in other states. The Special Counsel contended that these transfers were reprisals against the employees for complaining to members of Congress about the management of their office and for filing EEO complaints.

Under the Civil Service Reform Act, it is a prohibited personnel practice to take a personnel action as a reprisal for the disclosure of certain information by an employee or for his or her exercise of appeal rights. 5 U.S.C. §2302(b)(8), (9).

The Board ruled that no reprisal for "whistleblowing" occurred since agency officials did not have knowledge of the employees' disclosures. The Board held that such knowledge is required to show a retaliatory motive under section 2302(b)(8), (9).

After ruling that employees are protected by section 2302(b)(9) from reprisals for EEO appeals, the Board found that the agency had committed a prohibited personnel practice under the section in its reassignment of one of the four transferred employees, since his EEO activities were considered by agency officials in ordering his transfer.

In ruling that the disciplinary reassignment of employees is a legitimate tool of management, the Board adopted OPM's view that such reassignments are not, per se, adverse actions under the Reform Act. As the Board made clear, "an employee whose intransigence and opposition to management at all levels creates personnel conflicts may be transferred to another location as a sound management technique."

However, the Board held that a personnel action based on both a legitimate management objective and a retaliatory motive is a prohibited personnel practice under section 2302(b)(9) if the retaliatory motive is "a significant factor in the challenged personnel action."

The Board further ruled that its choice of corrective action must depend on whether the prohibited personnel practice or practices "were caused by underlying and systemic abuses." Thus, in this case, the Board went beyond merely setting aside the transfer and ordered that the agency take a number of steps aimed at correcting its EEO problems.

In a subsequent action, denying a stay of the transfers pending appeal to the United States Court of Appeals, the Board reaffirmed that in order to enjoin an agency's taking of personnel action, the affected employee must show "irreparable harm." Such a showing must be supported by verified statements under oath and, in the case of transfers to another locality, go beyond the usual types of disruption that occur whenever an employee changes jobs. Although the Board did not establish specific standards for "irreparable harm", it made clear that the personnel action would have to result in "extraordinary personal problems" or "severe personal disruption" and would have to be weighed against the public harm caused by staying an action which was designed to foster good management.

In deciding whether to issue a stay, the Board said it would take into account the possibility of monetary relief sufficient to make the employee whole and thereby eliminate potential irreparable harm. Such monetary relief could be ordered by the Board under its broad corrective action authority to order a federal employee made whole if it is found on appeal that the employee has been subject to a prohibited personnel practice.

Finally, the Board rejected the argument that claims of whistleblower status perpetually shield an employee from subsequent properly motivated personnel actions. As the Board said, "even a cursory reading of the legislative history of the Reform Act shows the clear congressional intent that whistleblowing claims must be carefully weighed against legitimate management preogatives." Frazier. Ann Allen: 632-5421; Allison Wolf: 632-4518.

Senior Executive Service

The Setting of SES Pay Is Not Appealable

An employee filed an appeal with the MSPB challenging the pay level which he had been offered on conversion to the SES. In its brief, OPM argued that since the employee did not suffer any reduction in pay upon conversion to the SES, he was not "aggrieved" by this action. Further, OPM argued that the agency had acted properly in exercising its discretion to set the pay level of an SES member. The presiding official adopted the OPM position and dismissed the appeal.

In reaching his decision, the presiding official found that he could consider the appellant's allegations that the agency had engaged in a prohibited personnel practice, namely cronyism. Where a separate basis for jurisdiction exists, the presiding official found that the MSPB has concurrent jurisdiction with the Special Counsel to entertain claims of prohibited personnel practices. The presiding official found, however, that no prohibited personnel practice had occurred. Gavazzi. Ann Allen: 632-5421.

Refusal To Convert a GS-15 Employee To The SES Is Not Appealable

The appellant, a GS-15 employee, had been unofficially acting in a position which was subsequently designated as being an SES position. This designation occurred after appellant had ceased serving in the acting capacity. Appellant claimed he was entitled to convert to SES based on the fact that he had held the position on an acting basis prior to its conversion. The MSPB Field Office adopted OPM's position and held that an employee is not entitled to convert to the SES based on prior acting service if the position is later designated as an SES position. Koss. Ann Allen: 632-5421.

In a similar case, appellant alleged that his position should have been classified as a supergrade position and that the agency failed to so classify the position in reprisal for his criticism of the agency. Based on his allegation concerning the wrongful classification of the position, appellant further argued that the position should have been converted to the SES. MSPB held that only positions properly classified at the GS-16 level or above could be designated as within the SES. Further, an agency has discretion in determining those positions which should be classified at the supergrade level. Mundy. Paul Trause: 632-5506.

Pending Cases

Adverse Actions

Fitness-for-Duty

An IRS agent was separated for several instances of conduct that caused disruption and disturbance of official business and hampered the development and disposition of the case assigned to the agent. The conduct included the improper release of information to a taxpayer and to a third party. The agent admitted the facts but appealed the removal on the basis of sex and mental handicap discrimination. The presiding official overturned the agency's action on the ground that the agency had discriminated against the agent on the basis of mental handicap. His conclusion was based in part on his belief that the agency had

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not fulfilled its duty to direct the agent to take a fitness-for-duty exam to determine whether or not the agent was a "qualified handicapped person" under the EEOC regulations governing the treatment of qualified handicapped individuals.

The issue is whether there is any authority mandating that an agency force an employee to submit to a fitness-for-duty exam before taking adverse action against him for serious misconduct. OPM has argued that there is no such requirement under adverse action or EEO regulations and that an agency's duty is limited to a reasonable accomodation, if possible, to the known limitations of a qualified handicapped employee. Adkins. Elise Smith: 632-6124.

Use of Prior Disciplinary Action

The issue in this case is whether an agency may rely on an employee's past disciplinary record to determine the appropriate penalty to impose in an adverse action. A further issue concerns whether MSPB can reexamine the merits of the earlier cases. OPM has argued that earlier disciplinary actions can be used provided that certain criteria had been met at the time they occurred. The employee must have been informed of the action in writing, been given an opportunity to present his or her case to a higher authority, and the action must have been a matter of record. OPM's position is a continuation of prior Civil Service Commission policy as set forth in FPM Supplement 752-1. McConnell. Ann Allen: 632-5421.

Standard of Review of Penalty

The issue raised in this case is whether an agency adverse action decision can be reversed solely on the ground that the appellant received a disparate penalty. The presiding official found that the agency's removal action was supported by a preponderance of the evidence and that it was not an excessive penalty in view of the appellant's tarnished work history. Nevertheless, the action was reversed on the ground that other employees had been given lesser penalties for similar offenses.

In its brief to the Board, OPM argued that the preponderance of the evidence standard set forth in 5 U.S.C. §7701(c) can be applied only to factual determinations and that the selection of a penalty is a matter left to agency discretion. Moreover, disparate treatment standing alone does not invalidate an agency's choice of penalty determined not to be excessively severe. Lomax. Rhoda Lawrence: 632-5421.

Appeal Right of Preference Eligible Employee of U.S. Postal Service

The issue raised in this case is the correct statute to be applied in determining the appeal rights of a preference eligible employee who had moved from a competitive service position to an excepted service position in the Postal Service. The presiding official applied 39 U.S.C. §1005(a)(2) and Part 315 of the Code of Federal Regulations of Title 5 in determining that the appellant should have the benefit of Chapter 75 as if he were a competitive service employee.

OPM intervened before the Board, arguing that §7511(a)(1)(B) of Chapter 75 is the correct statute and the only statute to apply in determining the appeal rights of the appellant, and that the sole issue is whether the appellant had "completed one year of current continuous service in the same or similar positions." Shobe. Elise Smith: 632-6124.

Attorney Fees

What is Appropriate Standard for Granting Attorney Fees?

The presiding official awarded attorney fees to the appellant based on a finding that the agency had not objected to the appellant's petition for fees. OPM petitioned the Board for review of this award raising the issue of whether an award of fees is appropriate only when the presiding official has determined (1) that the employee or applicant has in fact prevailed and (2) that the agency acted in bad faith, knew or should have known that the action was clearly unwarranted or committed gross procedural error. OPM argued that sovereign immunity bars an award of attorney fees unless these statutory conditions have been met. Therefore, fees cannot be awarded solely because that the agency failed to respond. Finally, OPM

maintained that to permit meaningful review of the presiding official's order, that order must contain specific findings, detailing the rationale for an award of attorney fees. Frost. Emily Marwell: 632-4518.

Grade and Pay Retention

May an Employee Entitled To Grade and Pay Retention Appeal the Demotion?

The central issue raised in these cases is whether an employee who is reduced in grade, and who is thus entitled to grade and pay retention benefits, may nevertheless appeal the reduction in grade to the MSPB. In four cases, the appellants' positions were reclassified under a new classification standard. The appellants were demoted and, as a result, became entitled to retained grade and pay under 5 U.S.C. §5361, et seq. The Field Office rejected the appeals as not within the purview of the Board's appellate jurisdiction and the appellants are seeking reopening by the Board.

OPM opposed the petition to reopen and filed a brief arguing that an employee who is entitled to retained grade and pay because he has been reduced in grade cannot appeal the reduction in grade to the MSPB. This position is supported by 5 U.S.C. §5366(b), which provides that the action which forms the basis for entitlement to grade and pay retention shall not be treated as an appealable action. Baldwin, Atwell, McCommons and Bernhard. Lydia Parnes: 632-6124.

Resignation

Withdrawl of Resignation

An employee who had voluntarily resigned sought to withdraw his resignation prior to its effective date. The agency refused this request on the ground that the employee's position had been committed to a replacement. One of the issues raised in this case is whether an agency is required to accept an employee's request to withdraw a resignation when the position has been committed and there are no other vacancies in the employing office. OPM has argued that an agency may deny such a request when: 1) the agency has hired or has made a commitment to hire a replacement; 2) acceptance of the resignation withdrawal would cause administrative disruption; or 3) the agency has some other valid reason for its action. When there are no vacancies available in the employing office, acceptance of the resignation withdrawal would cause administrative disruption. Jackman. Lydia Parnes: 632-6124.

Retirement

Is a Military Disability Determination Binding on OPM?

The issue in this matter is whether OPM is bound by findings of military disability. Appellant, a National Guard Technician, was found disabled for military service based on chronic obesity. On appeal from his being denied civilian disability retirement on the ground that he was not totally disabled for useful service as required by Civil Service law, the presiding official, citing the Court of Claims decision in Allen v. United States, found that OPM was bound by the military decision. In a petition to reopen, OPM argued that it has sole authority to determine disability for civilian retirement purposes and is not bound by military retirement decisions which are based on a totally different statutory standard. Wojtkowiak. Naomi Miske: 632-5524.

Law Enforcement Officer Retirement Benefits

A District of Columbia Police officer alleged entitlement to the special retirement benefits provided in 5 U.S.C. §8336(c) for federal employees engaged in the "investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws". The issue is whether special retirement benefits are available to police officers whose primary function is protecting life and property. OPM is arguing that according to appellant's own submissions, his primary duties are aimed at maintaining law and order or

protecting life and property, not the apprehension of criminals. Therefore, he is not entitled to the special retirement benefits.

MSPB Standard of Review

In a second brief, OPM is arguing that legal retirement appeals are not subject to the provisions of 5 U.S.C. §7701 mandating a hearing in all cases. Rather, OPM is contending that retirement appeals should be heard pursuant to 5 U.S.C. §8347(d) and regulations should be promulgated tailoring the procedures to the unique nature of the cases. Hein. Earl Sanders: 632-5524.

Within Grade Increases

Waiving Appeal Rights

This case involves an appeal from the denial of a within-grade salary increase by an employee who had entered into a negotiated agreement with the agency pursuant to which he had received certain benefits in consideration for, among other things, not appealing the within-grade denial. The New York Field Office of the MSPB held, in part, that the employee could not waive this appeal right. OPM is intervening to assert that the negotiated agreement is proper and is binding on the parties to it, and that the employee is estopped from appealing. Abramsky. Ann Allen: 632-5421.

Prohibited Personnel Practices

"Whistleblower" Protections

The primary issue raised in this case is whether an employee is entitled to the protections afforded a whistleblower when the allegations of agency mismanagement are made by the employee within the chain of command.

This case involves the geographic reassignment of two employees who claim that their reassignments were proposed in reprisal for their disclosure of agency mismanagement. The appellants disclosed the alleged mismanagement only to higher level officials within the agency. Nevertheless, the Special Counsel found that an employee who discloses such mismanagement within the chain of command is entitled to "whistleblower" protections.

In this case, the Special Counsel sought, and received, a stay of appellants' reassignments. The case is presently pending before the Board on the Special Counsel's Petition for Corrective Action. Tariello. Ann Allen: 632-5421.

Federal Court Litigation

Appeals

"Old System" Cases

Based on the savings clause in the Civil Service Reform Act, 5 U.S.C. §1101 note, P.L. 95-454, §902(b), two courts have held that matters arising prior to January 11, 1979, are not subject to the judicial review provisions of 5 U.S.C. §7703. Thus, where employees were given notice of proposed removal prior to January 11, 1979, both the administrative appeal and judicial review procedures would be based on pre-Reform Act statutory and regulatory provisions. Kyle v. Interstate Commerce Commission, D.C. Cir. No. 79-1307 (Oct. 26, 1979); Gaskins v. United States Postal Service, Court of Claims No. 5-79 (Oct. 23, 1979). Paul Trause: 632-5506.

Compensation

Pay Cap for Non-Appropriated Fund Employees

The District Court for the District of Columbia held that the 5.5% pay cap on non-appropriated fund employees established by Presidential memorandum in January 1979 for Fiscal Year 1979 is constitutional. Plaintiff unions had argued that the limitation was unconstitutional since the comparability increases "vested" in October and could not be retroactively divested. The government had contended that there was no absolute right to the pay increase indicated by the comparability study. Rather, any pay increase under 5 U.S.C. §5343 would become fixed only after the President analyzed and studied the data from the comparability study, considered the public interest and issued wage schedules.

The court, agreeing with the government's position, held that the Executive may properly limit the amount of a proposed pay increase at any time before he has exercised his discretion and issued wage schedules. Since the wage schedules had not been issued, the amount of the pay increase had not become a vested entitlement. AFGE v. Brown, and NFFE v. Brown, (D. D.C., Nov. 29, 1979). Hank Watkins: 632-4518.

Coverage of National Guard Technicians Under the Fair Labor Standards Act

The Fifth Circuit Court of Appeals has affirmed the decision of the District Court that National Guard Technicians are limited to compensatory time off in lieu of overtime compensation notwithstanding the extension of the overtime provisions of the Fair Labor Standards Act to federal employees. The District Court had held that the specific provisions of the National Guard Technicians Act of 1968, 32 U.S.C. §709(g), limiting National Guard Technicians to compensatory time off in lieu of overtime, took precedence over the Fair Labor Standards Act Amendments of 1974, P.L. 93-259, extending that Act to federal employees. Wright v. Alabama Army National Guard, Fifth Cir. No. 77-2682 (Oct. 15, 1979). Allison Wolf: 632-4518.

Excepted Service

Conflict Between Courts

The Court of Claims has issued a recent decision differing from two Courts of Appeals on the question of the due process rights of excepted service employees. In considering the rights of a non-veteran attorney who was removed, in part, on charges of improperly interfering with a police investigation, the Court of Claims held that language in the agency handbook referring to "tenure" in the determination of RIF rights did not automatically create a property interest in excepted service attorneys entitling them to full due process upon termination.

In so holding, the Court of Claims has differed with two other courts considering similar situations. In Ashton v. Civiletti, the District of Columbia Court of Appeals held that a letter given the excepted service plaintiff by his employer, providing for a probationary period to demonstrate fitness, conveyed to the employee the belief that he would continue to serve unless his performance was unsatisfactory. Therefore, even though his position was "excepted by law from the competitive Civil Service," the court found the employee had a property right entitling him to a due process hearing upon termination. While Ashton was decided too late to have been considered by the Court of Claims, that court specifically rejected the decision of the Seventh Circuit in Paige v. Harris, 584 F.2d 178 (7th Cir. 1978), that the same handbook at issue in the instant case created a property interest in the agency's attorneys. The Court of Claims held that it would be inappropriate for the clearly established Congressional distinction between the competitive and excepted service to be undermined by less than precise use of words in a handbook prepared by a low level agency staff member.

Thus, there is a split in the circuits on the question of whether agency-written material loosely referring to "tenure" or "probationary periods" can create a property right in excepted service employees where a clear statutory distinction has been made between the competitive and excepted service. The question awaits a decision on any future appeal.

In a further holding, the Court of Claims held that it had no jurisdiction to consider plaintiff's allegations that he was stigmatized by the removal action and therefore the violation of his liberty interest entitled him to a hearing. Since the jurisdiction of the Court of Claims is limited to money claims and, under recent Supreme Court decisions, plaintiff could sue only to clear his name, that Court would have no jurisdiction. Rather, plaintiff's appropriate remedy would be an action under the Privacy Act to expunge any untrue and derogatory information from his file. Fiorentino v. United States, Court of Claims No. 390-77 (Oct. 1979). Bob Moll: 632-7600.

Patronage Hiring

Effect of State and Local Hiring on Independent Candidates and Voters

The District Court for the Northern District of Illinois has held that independent candidates, voters and taxpayers are denied their constitutional rights by local patronage practices that use government jobs to help elect government-supported state and local candidates. The court found that such patronage practices constituted an intentional discrimination by authorities in which one class was favored over another and gave the candidates an actual significant advantage in elections. Thus, the court held that the use of state and local government patronage power to coerce political support for the regular party organizations and their candidates, to the great extent that it was effective in the Northern District of Illinois, violated the plaintiffs' right to fair and equal participation in the electoral process. The question of appropriate remedies was set down for later consideration. At such time as a final order is issued, defendants have indicated in published reports that they will seriously consider an appeal.

Shakman v. Democratic Organization of Cook County, (N.D. Ill.). Elise Smith: 632-6124.

Privacy Act

Amendment of Investigative Files

Plaintiff was given access to a Civil Service Commission background investigation conducted on him during his probationary period as a Deputy U.S. Marshal. He then filed a request under the Privacy Act to have the file amended to purge "all defamatory, incorrect, scandalous and prejudicial matter which has been included and which is not based upon any direct evidence or witness testimony, but rather is in the nature of hearsay, rumor, and gossip". After his request was refused at the agency level for failure to specify those portions of the file he wished amended, plaintiff sought judicial review.

The court noted plaintiff's failure to pinpoint those portions of the file to be amended and concluded that, in any event, the bulk of the material he wished to have expunged consisted of expressions of opinion by various persons contacted by Civil Service investigators concerning his character and fitness for employment. Such material, the court found, is not covered by the Privacy Act, which requires only the excision of data that is inaccurate, irrelevant, untimely, or incomplete. Opinions do not fall in that category, in the view of the court, because although one might disagree with opinions, they cannot be regarded as subject to correction on grounds of inaccuracy. Castle v. U.S. Civil Service Commission, (D. D.C.). Lew Fischer: 632-5524.

Cases before FLRA

Decided Cases

Representation

To Establish a Breach of Duty of Fair Representation a Member Must Show That the Union Treated Other Employees Differently

The FLRA adopted an ALJ's decision on the scope of the union's duty of fair representation. The ALJ had refused to find that the union had committed an unfair labor practice under E.O. 11491 when the union president stated that the complainant's EEO case was without merit and subsequently refused to represent him or act as his technical advisor in the EEO case. A union does not have a duty to "blindly represent the causes of its members" the ALJ concluded. "To establish a breach of the duty of fair representation", he added, "a member must show that he was treated differently from other members". American Federation of Government Employees, Local 2126, AFL-CIO, San Francisco, California and Julian J. Reimoneng, 1 FLRA No. 112. Hal Fibish: 632-9876.

Proper Subject of Bargaining

Starting and Quitting Times

A union's proposal with respect to starting and quitting times which did not affect the numbers, types and grades of employees assigned to the Taxpayer Assistance Section or to its existing tour of duty was a mandatory subject of bargaining. The activity had eliminated one of three staggered starting and quitting times (6:30-3:00; 7:00-3:30; 7:20-3:50). The union proposed that it be reinstituted. The activity argued that the issue fell within the ambit of section 7106 (b)(1) of the FSLMR statute and, therefore, was negotiable in its discretion. The Authority disagreed. In its view, the proposal related "only to permitting a modicum of flexibility within the range of starting and quitting times for the existing tour of duty", and was, therefore, a required subject of bargaining. National Treasury Employees Union, Chapter 66 and Internal Revenue Service, Kansas City Service Center, 1 FLRA No. 106. Hal Fibish: 632-9876.

Agency Shop

The Authority found non-negotiable a union proposal to create an agency shop requiring that monies equal to regular union dues be withheld from the pay of non-union unit employees. The union had contended that neither the language of The Federal Service Labor-Management Relations (FSLMR) statute nor its legislative history precluded the negotiation of agency shop arrangements. The Authority disagreed, noting that not only did section 7102 give employees the right to form, join, or assist unions, but it also gave them the right to refrain from such activities. It also pointed out that the Joint Explanatory Statement of the Committee on Conference emphasized that nothing in the conference report was intended to authorize the negotiation of agency shop provisions. Service Employees International Union, Local 556 and Department of the Army, Headquarters, U.S. Army Support Command, Fort Shafter, Hawaii, 1 FLRA 64. Hal Fibish: 632-9876.

Official Time to Prepare Reports Required by 5 U.S.C. §7120(c) is Negotiable

The Federal Labor Relations Authority concluded that the use of official time for the preparation of reports required by 5 U.S.C. §7120(c) is negotiable. Preparation of such reports does not relate solely to the institutional structure of the union and therefore does not constitute internal union business within the meaning of 5 U.S.C. §7131(b).

The disputed proposal stated that the union president or his/her designee would be granted two hours official time each day for the preparation of reports required by 5 U.S.C. §7120(c) and for carrying out the provisions of the agreement. The agency alleged that the portion of the proposal relating to the preparation of reports was non-negotiable because it came into conflict with the state's restriction on the use of official time for the performance of activities related to the internal business of a labor organization. The fact that such reports were required was immaterial, the agency contended.

The Authority noted that the statute illustrates, but does not define, "internal business of a labor organization". Looking to the legislative history, the Authority concluded that the key factor in determining whether an action relates to internal union business is whether the action relates solely to the structure and institution of the union. It concluded that section 7120(c) reports do not. Instead, "they function as an externally imposed disclosure mechanism". Consequently, the Authority reasoned, section 7131(b) does not bar negotiation of official time for preparation of reports required by section 7120(c). American Federation of Government Employees, AFL-CIO, Local 2823 and Veterans Administration, Regional Office, Cleveland, Ohio, 2 FLRA 1. Hal Fibish: 632-987

Proposals Which Delay But Do Not Prevent Management's Right To Suspend or Remove Employees Are Negotiable Under 5 U.S.C. §7106(b)(2)

The Authority upheld the negotiability of a union proposal which provides that implementation of a disciplinary suspension or removal be delayed until the grievant has exhausted the review provisions contained in the parties' agreement and a "final determination" is rendered. The agency had argued that the proposal was non-negotiable, because the procedure it would create would unreasonably delay the agency's ability to exercise its authority under section 7106(a)(2)(A) of the statute to suspend and remove employees.

The Authority determined that the agency's position is not supported by the legislative history of the statute. In the Authority's view, Congress intended section 7106(b)(2) of the statute to authorize an exclusive representative to negotiate fully on procedures which management will observe in exercising a specified management right provided that such procedures do not prevent agency management from acting at all. American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Ft. Dix, New Jersey, 2 FLRA 16. Jim Hicks: 632-9876.

A Proposal to Stay Suspensions Pending Exhaustion is Negotiable

The Authority upheld the negotiability of a union proposal which provides that a suspension of an employee be stayed pending exhaustion of the grievance and arbitration procedures provided for in the agreement for a maximum of 50 days following the employee's receipt of the employer's decision to suspend. Under this proposal, if an arbitration award has not been rendered within the prescribed 50-day period, the employer may implement the suspension.

Relying on its decison in American Federal of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Ft. Dix, New Jersey, discussed above, the Authority concluded that the union's proposal, which permits the agency to implement the suspension of an employee within a definite time period, even without an arbitration decision, would have a limited effect on the exercise of management's statutory right to suspend employees. The proposal would not prevent the agency from acting at all pursuant to its right to suspend employees, and, therefore, is negotiable. National Treasury Employees Union, Chapter 103 and 11 and U.S. Customs Service, Region VII, 2 FLRA 15. Jim Hicks: 632-9876.

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MSPB Cases

Decided Cases

Adverse Actions

Harmful Error

The MSPB has determined that the CSRA's harmful error standard prohibits reversal of an agency action where the error involves matters "largely irrelevant to the major issues of the case" and the employee does not demonstrate that the error would "in all likelihood" have affected the agency's decision.

The appellant was removed for striking and the MSPB Field Office reversed the agency's action. The Field Office found that the agency committed harmful error by not adequately considering the appellant's written reply to the charges. The written reply discussed appellant's participation in an alcoholism counseling program and a union agreement that special consideration be given to employees participating in the program.

While the alcoholism issue was considered by the agency, the issue was not mentioned in its final decision. Further, the agency did not provide the Board with a written summary of the employee's oral reply, which included reference to the alcoholism matter. However, at no time did the employee contend that the counseling, or an alcohol problem, were in any way related to his removal. OPM intervened in order to express its view that no harmful error had occurred because the employee was not substantially prejudiced, and there was no likelihood that such an error affected the result. (In Brief, Vol. 1, #1).

In upholding the removal, the MSPB found that the agency had committed error in failing to provide the Board a written summary of the employee's oral reply as required by OPM regulations. However, since there was no indication that the content of that reply could have affected the result, the Board determined that the error had not been harmful.

Congress adopted the harmful error standard in the CSRA in order to reduce the number of reversals of agency actions for "technicalities." Before the CSRA, evidence showed that many reversals occurred due to errors which had caused no harm to the employee. Such reversals were seen as a deterrent to supervisor's taking disciplinary action which was necessary for the efficiency of the service.

The MSPB's decision clearly establishes the principle that an agency action will not be reversed because the agency committed a procedural error, unless the employee demonstrates that the error resulted in substantial harm to the employee and was likely to have affected the agency decision. Graham v. U.S. Postal Service. Allison Wolf: 632-4518.

Involuntary Retirement

The MSPB remanded a matter to the Field Office to consider under what circumstances a retirement prior to the effective date of an adverse action is coerced. On remand the Field Office considered both disputes over the length of time that elapsed between discussions of possible resignation and the effective date of the adverse action and the effect of that time finding on the question of coercion.

OPM intervened and argued that an employee who retires to avoid an adverse action is presumed to have retired on a voluntary basis. To rebut this presumption, the employee must come

forward with objective evidence to establish that the retirement was the result of coercion. Further, OPM argued that once an agency has issued a final adverse action decision, it is not required to delay the effective date in order to accommodate an employee who wishes to retire.

On remand, the Field Office held that appellant's retirement was voluntary. It concluded that appellant had first discussed the availability of retirement seven days before the effective date of removal. Thus, he had ample time to choose between retirement and removal for cause. Further, any possible time pressure imposed on the appellant was the result of his own delay in contacting agency officials. The appellant has filed a petition seeking review of this decision by the MSPB. Murray v. Defense Mapping Agency. Lydia Parnes: 632-5423.

Prohibited Personnel Practices

Standard for Stays

In a recent decision, the MSPB has set forth the appropriate standards for the issuance of a stay under 5 U.S.C. §1208. The case involved the Special Counsel's application for simultaneous issuance of stays under 5 U.S.C. §1208(a) (a 15-day stay), (b) (a 30-day stay) and (c) (an indefinite stay). The stays were requested to prevent appellant's removal, pending completion of the processing of her age discrimination complaint. The agency alleged, inter alia, that the Special Counsel had improperly relied upon the findings of the EEO officer, and had not made her own investigation.

At the outset, the Board noted that it was inappropriate for the Special Counsel to request a stay to allow completion of any administrative remedy including the discrimination complaints process. This would encourage employees to appeal to remain on the roles and would thus defeat a primary purpose of the CSRA which was to ease the removal of non-performing employees. According to the Board, the sole purpose of the stay authority is to allow completion of the Special Counsel's investigation. Further, the Board noted that the Special Counsel's adoption of the EEO officer's findings was based on an independent analysis of the record. However, the Board held that it would have been, in fact, inappropriate for the Special Counsel to rely on the EEO officer's findings since he or she must "make an independent determination based on the actual record, not...rely upon conclusions drawn by any third party."

The Board found that requests for stays under §1208(a), (b) and (c) should be made sequentially since the three serve different purposes and the standards differ. Section 1208(a) and (b) stays are designed to give the Special Counsel time to investigate and "can be granted on the basis of relatively little information." However, in granting a stay under §1208(c) the "Board necessarily examines the Special Counsel's total investigation in order to decide whether the Board concurs in the determination that reasonable grounds exist to believe that a prohibited personnel practice exists."

In considering a request for a 15-day stay under §1208(a) the Special Counsel must determine there are "reasonable grounds" to conclude that a prohibited personnel practice has occurred or will occur." The Board member considering the request should grant it unless "the facts and circumstances involved appear to make the stay request so inherently unreasonable that the granting of a stay would be inappropriate." In considering a stay under §1208(b), however, the Board should make a more in depth inquiry and may consider it appropriate to request submissions from the agency. When considering a request for a stay under §1208(c), there must be an affirmative finding by the entire Board that the Special Counsel's request is reasonable.

In determining what is reasonable, the MSPB reiterated its position in In re Frazier, cited in In Brief, Vol. I, #2, that the test is whether the "reasonable grounds fall within the range of rationality." Where there are disputed facts, the facts should be interpreted in the manner most favorable to a finding of reasonable grounds. The "range of rationality" is very broad in a §1208(a) stay and becomes much narrower under §1208(c) where the Board must make an independent judgment as to whether to concur in the Special Counsel's recommendations.

In this case, the Board noted that the number and quality of affidavits indicating that appellant was an incompetent performer far outweighed those indicating that she was the victim of age discrimination. On that basis the Board noted that "the record shows that the competence of Ms. Kass was in serious doubt. Surely that doubt was great enough to impose upon the Special Counsel the obligation to conduct further independent investigations before asserting that the 'reasonable grounds to believe' standard of §1208(c) had been met." Accordingly, the Special Counsel's request for the stays was denied. Kass v. Department of Justice. Sandra Shapiro: 632-4902.

Reduction In Force

Proper Scope of Review

In two recent decisions, the MSPB has held that the agency must establish by a preponderance of the evidence that a RIF was appropriate, given all the facts and circumstances. The Board has further found that the employee has the burden of showing procedural defects. The MSPB did indicate, however, that if the reasons for the RIF are appropriate, it will not look behind them to determine whether agency decisions that led to the RIF were proper.

In the first case, a class action was brought to appeal several separations, downgradings, and other actions taken by the agency as the result of a RIF. The RIF was necessary because of a reorganization caused by an agency decision to contract out certain work. Appellants' principal contention was that "contracting out" was an invalid basis for the RIF, because the work could have been performed by agency personnel and the abolition of jobs would not have been necessary. Thus, there would not have been a reorganization or lack of work justification to invoke RIF procedures under 5 CFR §351.201(a). The Board denied the Petition for Review and sustained the MSPB Field Office decision finding for the agency. The Board relied on earlier court decisions which upheld an agency's right to effect a reorganization based on a "contracting out" determination.

As reorganization is a valid management reason to invoke the RIF regulations, 5 CFR §351.201(a), the Board stated that it had no authority to review management's decision that a reorganization was appropriate. This decision was solely within agency discretion. Thus, if a "contracting out" determination could not be challenged to invalidate an otherwise proper reorganization, the agency can be said to have met the burden of proof standard for initiating the RIF. Griffin v. Department of Agriculture. Rhoda Lawrence: 632-5421.

In another case, a GS-13 employee was separated in a RIF after her job was abolished due to an agency reorganization. The employee contended that the agency had no bona fide management reason for the reorganization. She claimed that it was merely a pretext to set a RIF in motion so that she would be summarily removed for personnel reasons. On appeal, the MSPB Field Office sustained the agency action. In the decision, the presiding official allocated the burden of proof to the employee to establish improper agency motivation for the RIF by requiring demonstrative evidence of the agency's displeasure with the employee.

The Board reversed the decision, holding that the presiding official misapplied the burden of proof standard in 5 U.S.C. §7701(c)(1)(B). The Board held that the burden remains on the agency to persuade the Board by a preponderance of the evidence that the RIF regulations were in fact invoked for one of the legitimate management reasons specified in 5 CFR 351.201(a). Nonetheless, the Board ruled that the agency may establish a prima facie case by coming forward with evidence showing the reason for the RIF meets the requirements of 5 CFR §351.201(a). Once the agency makes this showing, the burden of going forward with rebuttal evidence shifts to the employee. The agency may then present additional evidence to support its ultimate burden of persuasion. The Board, finding that the agency had not met the ultimate burden of persuasion test in establishing that its reorganization was valid, concluded that the RIF was not authorized under 5 CFR Part 351 and cancelled the employee's separation. Losure v. ICC. Rhoda Lawrence: 632-5421.

Retirement

Law Enforcement Credit for D.C. Police

The Washington Field Office has upheld OPM's position that service as a D.C. policeman does not automatically constitute "law enforcement officer" service for purposes of receiving special retirement benefits at age 50 with 20 years service, under 5 U.S.C. §8336(c). Congress restricted the definition of "law enforcement officer" to positions whose duties are primarily the investigation, apprehension, or detention of Federal criminal suspects or convicts. The Commission and OPM have by regulation interpreted this definition as excluding positions whose primary duties are, for example, preserving the peace, patrol and protection of property, crowd control, traffic direction, and assisting at the scene of fire or accident. Thus, we have held that because the ordinary D.C. patrol officer's job consists primarily of these type of duties, rather than the investigation, apprehension, or detention of prisoners, it does not meet the definition of law enforcement officer.

Appellant challenged the validity of the OPM regulations as inconsistent with the statute. He also asserted that the Commission and OPM misunderstood the nature of D.C. police work. However, the Field Office held the regulations to be consistent with the statute, and sustained the validity of the application of the regulations to D.C. police patrolman duties.

Appellant had also claimed credit for service with the White House Police (now Executive Protective Service) which guards the White House, Executive Office Building, and foreign embassies. The Commission and OPM had held such service also ordinarily not creditable for purposes of 5 U.S.C. §8336(c). This decision was upheld by the Field Office, without discussion. Appellant has requested reopening by the Board. Hein v. OPM. Earl Sanders: 632-5524.

MSPB Standard of Review

In an earlier interlocutory appeal in the same case, the MSPB found that individuals appealing civil service retirement matters to the Board are entitled to an administrative hearing under the Board regulations. OPM had argued that retirement appeals should be heard pursuant to 5 U.S.C. §8347(d) and that regulations should be promulgated tailoring the procedures to the unique requirements of retirement matters. (In Brief, Vol. 1, #2).

The MSPB found that retirement appeals filed by employees fall within the terms of 5 U.S.C. §7701(a), which authorizes a hearing. Appeals filed by individuals who were neither employees nor applicants for employment, however, fall within the purview of MSPB regulations found in 5 CFR Part 1201. These regulations were promulgated under the general authority granted to MSPB by 5 U.S.C. §1205(a)(1) to "hear and adjudicate matters within its jurisdiction. Therefore, individuals who are neither employees nor applicants are also entitled to a hearing. Hein v. OPM. Earl Sanders: 632-5524.

Pending Cases

Adverse Actions

Indefinite Suspension

The issue posed by this case is whether a law enforcement agency may indefinitely suspend an employee who has been indicted for criminal violations resulting from his or her official conduct until such time as the criminal charges are resolved. Appellants, Border Patrol agents with the Immigration and Naturalization Service, were indicted on six counts for conduct arising directly out of their duties. They were suspended pending the outcome of the criminal charges. The presiding official reversed, finding that the suspensions did not promote the efficiency of the service because the appellants could have been reassigned to non law enforcement duties. In a separate but identical case involving two other INS employees, another presiding official found that such suspensions did promote the efficiency of the service in light of the seriousness of the charges and the fact that the agency had a law enforcement mission.

OPM has intervened to argue that indefinite suspension is permissible and is the only course of action available to an agency where a criminal indictment of an employee has interfered with the agency's ability to function. In order to promote the efficiency of the service, a nexus must be shown between the indictment and the ability of the agency to perform its function. An employee who has been indicted for a crime may not be placed on administrative leave. Proceeding with an administrative hearing on the merits of the acts set forth in the indictment may prejudice the rights of both the Government and the employee in the subsequent criminal proceedings. Thus, in one court case it was noted that the courts have "approved the administrative practice of deferring post-suspension action on proposed final removal from federal employment until the conclusion of criminal proceedings." Placing the indicted individual in another type of position may not be possible and may not be the type of decisive action that is required for the agency to maintain its credibility with the public it serves. If the employee is acquitted of the criminal charge, the indefinite suspension is vacated and the individual may receive back pay. Dick and Otherson v. Department of Justice. Elise Smith: 632-4518.

Disparate Penalty

The MSPB has been asked to consider whether an agency adverse action decision can be reversed solely on the ground that the appellant received a disparate penalty in circumstances which constituted a prohibited personnel practice. Appellant alleged that his removal for falsifying a travel voucher was a prohibited personnel practice because another employee of a different race had been given a lesser penalty for the same offense. The presiding official noted that the appellant had, in fact, falsified the voucher and that the misconduct warranted removal. However, he reversed the action on the ground that the disparate treatment constituted a prohibited personnel practice.

OPM has intervened to argue that the selection of a particular penalty in an adverse action is a matter committed to agency discretion and that a penalty must stand unless it is so inherently disproportionate to the offense as to constitute a clear abuse of discretion. Further, OPM argued that even if the appellant succeeds in showing that a prohibited personnel practice occurred, the penalty should not be overturned without a finding that, in the absence of the prohibited personnel practice, the removal would not have occurred.

An employee whose conduct warrants dismissal should not benefit by the agency's commission of a prohibited personnel practice. The Civil Service Reform Act was not intended to insulate employees from the consequences of their misconduct. At best, the matter should be remanded to the agency to reconsider the penalty in light of the disparate treatment. Stokes v. Department of Agriculture. Ann Wilson: 632-5421.

Nexus

The issue raised in this case is whether an employee serving in a critical-sensitive position in an agency with a national security mission may be removed for misconduct which adversely reflects on his general trustworthiness.

During an interview conducted by his employing agency, the appellant admitted engaging in incestuous acts with his minor daughter. The agency temporarily suspended the appellant's access to classified information and, shortly thereafter, he was separated. The MSPB Field Office agreed that the appellant's incestuous conduct reflected adversely on his general trustworthiness. Nevertheless, the Field Office reversed the removal on the ground that the agency had failed to establish a connection between the conduct and appellant's job performance or potential disrepute which would attach to the agency as a result of this conduct.

OPM filed a brief arguing that any misconduct which is found to impair an employee's general trustworthiness may, in appropriate circumstances, constitute a valid basis for removal. When the employee is serving in a critical-sensitive position with an agency having a national security function, and has access to the highest level of classified information, misconduct which evidences a lack of trustworthiness should, per se, satisfy the "cause" requirement of 5 U.S.C. §7513. Stalans v. National Security Agency. Lydia Parnes: 632-5423.

Several other cases involving the question of whether an employee's miscon-

duct is a sufficient basis for an adverse action are also pending before the MSPB. In Dennis v. U.S. Department of the Navy and Nocifore v. U.S. Department of the Navy, the Board is considering whether removal for theft of government property is for such cause as will promote the efficiency of the service. (In Brief, Vol. 1, #1). Barner v. U.S. Postal Service raises the question of whether an agency can take an adverse action against an employee for excessive use of leave even though most of the leave had been approved. (In Brief, Vol. 1, #3). Finally, in Gamble v. U.S. Postal Service, Monteroso v. Internal Revenue Service, and Merritt v. Bureau of Prisons, the MSPB is considering whether an adverse action may be based on an employee's off-duty misconduct. The adverse actions were based on off-duty possession of drugs and conviction for non-payment of taxes. (In Brief, Vol. 1, #3).

Appointments

When Does a Promotional Appointment Become Effective?

At issue in this appeal is whether an agency's failure to appoint an individual after he had been informed of his selection for the promotion, constitutes a demotion. An Air Force employee applied for a higher-graded position with the Army and had been orally informed of his selection. The Army subsequently notified him that a rival candidate had been selected. On appeal he alleged that Army's failure to employ him after its initial selection was a demotion.

The Field Office held that Army's reversal of its initial selection was not a demotion since appellant never entered on duty with the Army at a higher grade. The Board reopened the case and ordered the Army to file a brief "addressing the issue of when a promotional appointment becomes effective."

OPM has intervened arguing that appointment to a position in the Federal government is effected only when the person with appointing authority performs the last act required by the appointment process. The courts have held that completion of the Standard Form 52 or Standard Form 50 by an agency official with appointment authority is the last act required in this process. Thus, a selecting official, in proposing to fill a position with a particular candidate, makes merely a request for appointment. OPM noted, in addition, that entrance upon duty is not a prerequisite for appointment. Furneyhough v. Department of the Army. Ann Wilson: 632-5421.

Attorney Fees

What Agency Action Justifies the Imposition of Attorney Fees?

OPM has intervened in a series of cases to address the issue of the appropriate standard for granting attorney fees under 5 U.S.C. §7701.

The central issue in one case was whether fees could be awarded "in the interest of justice" when the presiding official found that the agency had taken an action which it ought not to have taken. OPM intervened and argued that a fees award is not appropriate unless there has been a determination that (1) the employee or applicant has prevailed in a proceeding before the Board; and (2) with respect to the action giving rise to the Board's proceeding, the agency acted in bad faith, knew or should have known that the action was clearly unwarranted, or committed gross procedural error. Further, as in this case, a simple finding that mistaken judgment and/or negligence played a part in the agency's decision to take an action against an employee will not support an award of fees. Leth v. GSA. Ann Allen: 632-5421.

In another case, the question was whether a finding that the agency action was "clearly without merit" justified attorney fees awarded. The presiding official reasoning that "clearly without merit" is synonymous with "meritless" meaning "groundless" or "without foundation." He then concluded that the agency official's action was "without foundation" because it was based solely on findings in a Postal Service

audit report, rather than his independent investigation.

OPM intervened to argue that an agency's action is "clearly without merit" only if it is without colorable basis in law and fact. It argued that the Board must avoid the temptation to "engage in post hoc reasoning concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." OPM argued that to award fees the presiding official must find more than the agency's failure to prove its case. It must find that it was unreasonable for the agency official to have relied on the information before him or her in deciding to take the action. OPM argued, in this regard, that an agency official may reasonably base an action on information which comes to him or her through normal agency channels, unless reason exists to believe that such information is erroneous. Stout v. United States Postal Service. Emily Marwell: 632-4600.

Preponderance of the Evidence

Three cases have discussed the relevance of an agency's failure to support the charges by a preponderance of the evidence on its liability for attorney fees.

In one case a presiding official awarded fees merely on the ground that the agency had failed to support the charges underlying an action by a preponderance of the evidence. The presiding official reasoned that the appellant should not have to pay the cost of fees incurred appealing an action which ought not to have been taken. OPM's brief reiterated the positions taken in other cases: that fees should not be awarded unless the agency acted in bad faith, knew or should have known that the action was unwarranted or committed gross procedural error. Piper v. Department of Justice. Ann Allen: 632-5421.

In a similar case, a presiding official awarded fees on the ground that the agency's failure to sustain its charges by a preponderance of the evidence was equivalent to a finding that the charges were clearly without merit, thus permitting a fees award. In the brief in support of intervention, OPM argued "clearly without merit", as used in 5 U.S.C. §7701(g) is more restrictive than mere failure to support underlying charges by a preponderance of the evidence. Failure to meet this evidentiary standard does not mean that the agency action was necessarily not in the interest of justice. Perez v. Department of the Navy. Ann Allen: 632-5421.

OPM also intervened in a case in which the presiding official based a fees award on the agency's failure to support the underlying charges with the requisite evidence and on the agency's failure to contest the fact that payment of fees would not be in the interests of justice. OPM asserted the position outlined in Leth. It argued further that the agency's response, or a lack thereof, to a fees motion does not affect the presiding official's obligation to assure that the prerequisites of a fees award have been met by the moving party. McBride v. U.S. Department of Agriculture. Ann Allen: 632-5421.

Poor Performance by Agency Representative

Can fees be awarded merely because of poor performance by the agency's representative? In one case, the presiding official found the agency action probably supportable but awarded fees against the agency because of its representative's poor performance. The presiding official found that the agency representative was unfamiliar with prosecuting appeals. Further, this amounted to negligence which would justify an award of fees. The presiding official reasoned that attorney fees are justified "whenever an agency proceeds (in the proposing, deciding, or prosecuting stage) with an action and there is ill-will and/or negligence on the part of some agency official which exists to such degree as to unconscionably taint the entire proceeding; in addition all or most of the substantive...charges have not been sustained."

Although OPM has concurred in this basic formulation of the "warranted in the interest of justice" standard in an earlier brief, O'Donnell v. Department of Interior, (In Brief, Vol. 1, #3), it intervened in this case to challenge the application of this standard. OPM argued that poor performance by the agency representative is not a valid basis for a fees award. The fee provision is a make-whole provision, not a punitive one. Accordingly, OPM argued that unless fees were incurred as the result of an agency

action -- the decision to take or to continue to prosecute an action -- which is taken in bad faith, which the agency knew or should have known was unwarranted, or which was the result of a gross procedural error, a fee award is not justified. For this reason, OPM argued, the presiding official erred in awarding fees against an agency on the basis of its representative's inability to successfully present the agency's case. Trowell v. U.S. Postal Service. Emily Marwell: 632-4600.

Employment Practices

Time-in-Grade Restrictions

The MSPB is considering whether the time-in-grade restrictions found in 5 CFR §300.601 et seq., constitute employment practices and must be job-related under 5 CFR §300.101 et seq. Appellant was appointed from a register to a position as a GS-4 clerk-typist. She was later promoted under the agency's merit promotion plan to the position of GS-5 Customs Inspector. Appellant alleges that due to a previous series of temporary appointments as a GS-5 Customs Inspector, she should have had eligibility for an immediate appointment at GS-7.

FPM Chapter 300, Subchapter 6, §6-2(b) provides that "candidates for advancement to a position at GS-7, 9, or 11 which is in a line of work properly classified at two-grade intervals, must have completed at least one year of service in positions no more than two grades lower than the position to be filled." Section 6-2d(6), pertaining to the competitive service, requires that "prior service under non-permanent appointment at a level above that of the competitive appointment be credited as if it had been performed at the level of the competitive appointment." Accordingly, although appellant had served in a series of temporary positions, Customs credited her at the GS-4 level, the level of her first competitive appointment.

OPM reiterated the position taken in several other briefs: that time-in-grade requirements are not appealable under 5 CFR §300.101 because they are not intended to measure an individual's qualifications for a particular job. Rather, they are economic measures designed to control the Federal budget. In addition, OPM is arguing that even if time-in-grade restrictions are appealable, the policy limiting creditability for time spent in temporary positions is necessary to prevent abuse of competitive principles. Absent this restriction, employees could acquire competitive status at a higher grade based on an examination at a much lower grade. Reeson v. Customs Service. Gail Goldberg: 632-7790.

Restriction of Area of Competition

The issue presented is whether a restriction limiting the scope of competition in a vacancy announcement to current agency employees and former Federal employees with status is an employment practice reviewable by the MSPB. OPM argued that (1) the decision to limit consideration was made by the agency and is, therefore, not covered by Part 300 which permits review only of employment practices administered or required by OPM; and (2) a restriction in the area of consideration was not an employment practice which is defined by regulation to include the development and use of examinations, qualification standards, tests and other measurement instruments. Woolery v. General Services Administration. Murray Meeker: 632-5524.

Grade and Pay Retention

Appeal Rights

When employees are receiving grade and pay retention benefits because they were assigned to lower graded positions, may they appeal their reassignments to the MSPB? The appellants occupied positions which were reclassified to a lower grade and they were reassigned to the lower graded positions. On appeal, an MSPB Field Office held that under 5 U.S.C. §5366, no adverse action appeal right exists. The appellants are seeking reopening of this decision.

OPM filed a brief arguing that §5366 eliminates an adverse action appeal for

employees who are entitled to grade and pay retention as a result of a position reclassification. Even though grade retention is authorized for a limited period of time (2 years) both the statutory language and its legislative history evidence a clear Congressional intent to preclude adverse action appeals in these circumstances. Roosa and Mulvihill v. Defense Communications Agency. Lydia Parnes: 632-5423.

Reduction In Force

Competitive Area

The MSPB has reopened a case to consider whether a challenge to the designation of competitive area for priority placement purposes constitutes an appeal of a reduction in force. Appellant had been placed in a priority placement program after his position had been downgraded in a RIF. He appealed to the MSPB alleging that the geographic area for priority placement was overly limited. The appeal was dismissed for lack of jurisdiction.

OPM has intervened to argue that a challenge to the geographic area established for priority placement is not an appeal of a reduction in force action. Appellant is not contesting the competitive area specified for the RIF, which would be the subject of a regulatory appeal under 5 CFR Part 351. Rather, he is challenging the area of the Priority Placement Program which goes into effect after the RIF has occurred. There is no right of appeal to challenge the geographic parameters of this program. Wilson v. Department of the Navy. Ann Allen: 632-5421.

Retirement

Voluntary Disability Retirement

In response to a request from the MSPB, OPM has submitted a brief addressing the issues of (1) who bears the burden of proving entitlement to voluntary disability retirement; (2) what is the standard of proof in adjudicating disability retirement applications; and (3) whether an applicant must submit objective medical evidence of the existence of an alleged disabling disease or injury.

OPM has argued that a voluntary disability retirement applicant, as a claimant for benefits, must bear the burden of demonstrating his or her disability. OPM has further argued that in order to demonstrate entitlement to benefits, the claimant must show: (1) the existence of a medical disease or injury; (2) the existence of a service deficiency in conduct, performance or attendance; and (3) that the medical disease or injury caused the service deficiency. Finally, it is OPM's position that the intent of Congress in enacting the disability retirement provisions of 5 U.S.C. §8337 was to require objective medical evidence of disease or injury, i.e., evidence that can be independently verified through examination or observation. Aycock v. OPM. Earl Sanders: 632-5524.

MSPB Standard of Review

OPM has also responded to an MSPB request to address the issues of (1) who bears the burden of proving entitlement in an appeal to MSPB from an OPM denial of an application for disability retirement; and (2) what is the standard of review on appeal.

OPM has taken the position that a voluntary claimant for disability retirement bears the burden of proving that he or she was entitled to benefits. 5 U.S.C. §7701, which places the burden on the agency, was only intended to apply to an agency initiated action. OPM has further argued that MSPB review is limited, by the language of 5 U.S.C. §8347 and interpretive court decisions, to determining whether there has been some gross procedural error, misconstruction of the governing legislation or some like error going to the heart of the administrative determination. Chavez v. OPM. Earl Sanders: 632-5524.

Federal Court Litigation

Adverse Actions

Rights of Probationers

The Court of Claims has reiterated its prior holdings that a terminated probationary employee has the right only to be notified prior to termination of the agency's "conclusions as to the inadequacies of performance or conduct." Where a probationer claimed that his termination is in reprisal for filing a grievance, the court noted that "a fairly high standard of proof is required to sustain a claim of bad faith conduct on the part of a Government agency." Further, while acknowledging that the agency was required to serve plaintiff with notice prior to termination, the court held that agency officials were required only to make reasonable efforts to achieve personal service.

Here, the agency efforts to serve the notice included attempts to deliver the notice to the employees home address by both regular mail and personal visit, as well as sending a telegram to the hospital in which he was a patient. The court held that the agency had fulfilled its obligation. The court also held that the employee's probationary period commenced on the date recorded on the Standard Form 50. Shaw v. United States, Court of Claims No. 15-78 (April 30, 1980). Murray Meeker: 632-5524.

Compensation

Cost of Living Allowance

The United States District Court for the District of Hawaii has upheld the methodology and procedures used by OPM to determine the differences in living costs between the District of Columbia and those "nonforeign" areas to which the Cost of Living Allowance (COLA) program (5 U.S.C. §5941, E.O. 10,000, as amended) applies. The statute provides that funds available "for pay of employees stationed outside the continental United States or in Alaska whose rates of basic pay are fixed by statute" are available for an allowance "based on living costs substantially higher than in the District of Columbia." It was the manner in which OPM determines how much higher living costs are in Hawaii than in the District of Columbia which plaintiffs challenged in this class action.

The court rejected plaintiffs contentions that: (1) OPM uses faulty methodology in collecting and measuring differences in consumer prices, especially housing costs; (2) OPM should measure living cost differences by use of a "total budget" rather than the "consumption budget" approach; (3) the use of living cost data gathered within the Washington, D.C. Standard Metropolitan Statistical Area (SMSA) but from outside the District of Columbia itself is unlawful; (4) the weights OPM has used in the calculation of COLA indexes are improper and out of date; and (5) OPM's procedure for determining COLA indexes for employees who rent their living quarters from the Federal government is improper.

The court did find that OPM violated the Freedom of Information Act (FOIA) in refusing, prior to the institution of this court action, to produce raw COLA survey data which would reveal volume of sales information obtained from participating merchants under a pledge of confidentiality. However, the court suggested that claim may be moot because plaintiffs obtained the requested information through the discovery process.

In deciding in OPM's favor the court noted its limited review authority and found that OPM has acted within its

authority and in good faith. Accordingly, the court concluded that, because Congress has given only the broadest outlines as to how the COLA program should be administered, OPM has acted properly. This is true, even though the court believed that there may be "better ways than those used by OPM to make the required determinations in calculating COLA." The court also directed that if plaintiffs believe there is any basis for a request for costs and attorneys' fees regarding their FOIA claim, they should "promptly" file a motion requesting this relief. Schwind v. OPM, 77-0366 (March 31, 1980). Bob Moll: 632-7600.

Discontinuing Special Schedules for Prevailing Rate Employees

In this case, the Court of Appeals upheld the discontinuation of special wage schedules for patternmakers at the Puget Sound Naval Shipyard. Special wage schedules are generally developed for a specific occupation or group of occupations to deal with recruitment or retention problems. The special schedule for patternmakers was discontinued, however, because it authorized pay rates lower than those available under the regular wage schedule.

The plaintiffs had contended that the procedure used in converting them from special schedules to regular wage schedules was contrary to both the express language of the statute and its underlying intent. Specifically, they argued that: (1) a wage survey was required prior to conversion; (2) an entitlement to an administrative appeal existed; and (3) their compensation under the special schedule may not be altered without due process.

The court held that the law does require full-scale surveys at least once every two years. However, it found no basis for concluding that Congress intended the statutory survey requirements to apply to the conversion of wage schedules. Similarly, the court found that although the law provides for appeals of the classification of jobs, no statutory language or legislative history supports the extension of appeal rights to conversions from special to regular wage schedules. The court also concluded that the nature of plaintiff's interest in the special schedule was determined by the statute conferring the benefit and the regulations and provisions under which it was administered. As the statute provides no property interest in the continuation of the special schedule, plaintiffs had not been denied due process. Patternmakers League of North America v. Campbell, 9th Cir. No. 77-3133 (May 27, 1980). Allison Wolf: 632-4518.

Labor Relations

President's Police Bargaining Rights

Rejecting the claims of the Police Association of the District of Columbia, the District Court upheld Executive Order 12171 of November 19, 1979, removing the Executive Protective Service from collective bargaining provisions.

The Executive Order was promulgated under 5 U.S.C. §7103(b)(1). The Association claimed that: (1) the Executive Order and the statute violated the employees' First Amendment rights to freedom of speech and assembly in that it precluded them from exercising their right to collective bargaining; (2) the refusal to permit employees of the Service to engage in collective bargaining denies them equal protection of the laws in violation of the Fifth Amendment because other law enforcement officials (i.e., the United States Park Police and the Metropolitan Police Department) are permitted to bargain; and (3) because the Executive Order was issued by the President without providing the Association and employees a prior hearing, the presidential action amounted to a denial of due process in violation of the Fifth Amendment.

The Court rejected the Association's First Amendment claim, relying on the Supreme Court's decision in Smith v. Arkansas State Highway Employees, 441 U.S. 463 (1979). In Smith, the Court held that: "the First Amendment does not impose any affirmative obligation on the government...to recognize (a labor union) and to bargain with it."

The Association's equal protection argument was evaluated based on the "rational basis" standard of San Antonio School District v. Rodriquez, 411 U.S. 1

(1973). Thus, the court found that there is a rational basis for distinguishing between employees engaged in routine law enforcement duties and those charged with the protection of the President's safety.

Finally the court found no merit in the Association's assertion that issuance of Executive Order 12171 without a prior hearing denied the covered employees due process. In the court's view, no constitutionally protected liberty or property interest was involved in the case. Police Association of the District of Columbia v. Department of the Treasury. D.D.C. No. 78-0236 (May 19, 1980). Stuart Foss: 632-4442.

Patronage Hiring

Removal from Non-Political Positions

The United States Supreme Court has held that public employees can only be removed from their positions solely for political affiliation if the nature of their jobs are such that political affiliation is crucial to performance.

Plaintiffs were Assistant Public Defenders in Rockland County, New York who were removed when an election shifted the party control of the legislature. The Court based its decision on the lower court finding that the removals had been taken solely because of the employees' political beliefs. In an earlier decision, Elrod v. Burns, the Court held that the First Amendment prohibits the discharge of non-confidential or non-policy-determining public employees based on political beliefs. Here, the Court found nothing in the duties of an assistant public defender which justifies conditioning employment on political affiliation. Rather, the Court cited the District Court's finding that assistant public defenders had "very limited, if any, responsibility" for managing the Public Defender's Office or for implementing policy.

The Court emphasized that the test in Elrod was to be a common sense or reasonableness standard. Thus, it noted that "in sum, the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position, rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."

The Court made it clear, however, that its decision only applied to terminations based on political affiliation. Terminations based on other reasons, such as lack of confidence or a change in policy, would not constitute a First Amendment deprivation. In this context the Court notes that "to the extent that petitioner lacks confidence in the assistants he has inherited from the prior administration, for some reason other than their political affiliations, he is, of course, free to discharge them." Branti v. Finkel, U.S. Sup. Ct. No. 78-1654 (March 31, 1980). Sandra Shapiro: 632-4902.

Does the Branti Principle Apply to a Transfer?

The Court of Appeals for the Fourth Circuit has remanded this case to the District Court to determine whether, on the facts of this case, the transfer of an employee constituted a violation of the principles set forth in Branti: that an employee in a non-political job cannot be dismissed for political reasons.

Plaintiff was a State Director of the Farmers Home Administration who was transferred subsequent to a change in administration. He claimed that his transfer was for political reasons and thereby violated his constitutional rights. The District Court, deciding the case under Elrod v. Burns, found that the position was in fact policymaking and therefore a transfer for political reasons did not violate plaintiff's constitutional rights. On appeal, the Court of Appeals found that the intervening decision in Branti v. Finkel, required that the case be remanded to the district court. If the district court determines that the transfer was politically motivated, it will have to consider whether a transfer in those circumstances would violate Branti. In making this decision, the court is to weigh the employee's reasonable expectations of a geographic transfer against any circumstances in this case which would have placed the employee in an impossible situation without any real choice.

The court also noted that the transfer did not constitute a "reduction in rank" under the former 5 U.S.C. §7512 since there was no lowering of the plaintiff's official rank in the agency's organizational structure. DeLong v. USA, 4th Cir. No. 78-1847 (May 27, 1980). Sandra Shapiro: 632-4902.

This plaintiff occupied the same position as the plaintiffs in Committee v. Bergland. (In Brief Vol. 1, #3.) In Committee, the court, deciding the case under Elrod, held that it was unnecessary to determine whether the terminations had been in fact for political reasons since the removal of employees from policymaking positions did not violate constitutional rights. The court did, however, indicate in dictum, that the removals had been based on the policy determining nature of the jobs rather than political reasons. Although Committee was decided prior to its opinion in Branti, the Supreme Court has denied certiorari in the case.

Retirement

National Guard Technicians

Reversing a prior position, the Court of Claims has held that OPM was not compelled to grant civilian disability retirement to those National Guard Technicians terminated from their civilian positions due to their failure to meet medical standards required to retain their military membership in the National Guard. The holding specifically reversed the same court's prior decision in Allen v. United States, which had ordered OPM to accept a finding of medical unfitness for worldwide military service as establishing eligibility for civilian disability retirement, even if the individual was not totally disabled for useful and efficient service in his civilian position.

The decision is based on the finding that the statute "vests exclusive authority in the Commission to detemine questions of disability for the purposes of civilian retirement pay." The National Guard Technicians Act provides that a person must be a member of the National Guard to be employed as a civilian technician. In this case, plaintiff lost his membership in the Guard due to his failure to physically qualify for worldwide military service. Nonetheless, the Court found that there is nothing in the National Guard Technicians Act or its legislative history to indicate that OPM's role in determining disability for civilian service is in any way abrogated. Polos v. United States, Court of Claims, No. 405-77 (April 30, 1980). Naomi Miske: 632-5524.

Cases before FLRA

Decided Cases

Employee Representation

"Weingarten" Rights Extended to Employee Witnesses

In a recent decision, an Administrative Law Judge of the Federal Labor Relations Authority confirmed that the "Weingarten" rights available to Federal employees, by virtue of 5 U.S.C. §7114(a)(2)(B), extend to employees who are interviewed by management as "third-party" witnesses to an incident, as well as to employees who are the immediate subject of an investigation. Section 7114(a)(2)(B) provides that an employee who is interviewed by management is entitled to have a union representative present during the interview if: (1) the employee reasonably believes the examination may result in disciplinary action against him or her; and (2) the employee requests representation.

The Administrative Law Judge found that, under objective standards, the employee reasonably could have felt that disciplinary action might be taken against him as a result of the interview. The employee was not charged with the improper disclosure of taxpayer information which was under investigation. However, he was the custodian of those records and charged with their safekeeping and confidentiality. In the Judge's view, the employee's control of the taxpayer's files placed him in a critical position whereby his conduct, if improper, could later subject him to disciplinary action. Accordingly, reasoned the Judge, when the employer refused to allow the employee union representation at the interview, it failed to comply with the provisions of section 7114(a)(2)(B) of the Act and committed an unfair labor practice within the meaning of the statute. The agency has filed exceptions with the Authority. Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Hartford District Office and National Treasury Employees Union. Case No. 1-CA-77 (March 13, 1980). Stuart M. Foss: 632-4442.

Proper Subject of Bargaining

FLRA Rules Initial Area of Consideration and Its Expansion Negotiable

The Federal Labor Relations Authority held that a union proposal which would have altered the areas of consideration for bargaining unit positions from those which were established by the agency merit placement plan was negotiable.

The agency plan provided for three areas of consideration based on (1) membership in the Delaware National Guard, (2) prior military experience plus eligibility for membership, and (3) eligibility for membership alone. The union proposal established the following rank order: all civilian technicians, all members of the National Guard, and all others.

The Authority rejected the agency's arguments that this proposal was nonnegotiable because it established a mandatory rank order preference which would restrict management's authority to recruit and select employees for positions within the agency. Instead, the Authority held that the proposal was fully negotiable as a "procedure" authorized by 5 U.S.C. §7106(b)(2).

The Authority reasoned that the union's proposal would not prevent management from exercising its right to make selections from among properly ranked and certified candidates for promotion or from any other appropriate source. Rather it would merely provide a procedure for defining the initial area of consideration under the agency merit placement plan and for the expansion of that area of consideration.

Nothing in the proposal required the agency to make a selection; the proposal required only that the agency consider bargaining unit employees in filling vacant positions along with applicants from other sources. Thus, the Authority found the proposal similar to the one it had considered and upheld in Perry Point where it had first held that such "sequential consideration" is a lawful procedure that may be negotiated under the Act. Accordingly, for the reasons set forth in Perry Point the proposal was held to be negotiable. Association of Civilian Technicians, Delaware Chapter and National Guard Bureau, Delaware National Guard, Case No. 0-NG-104, 3 FLRA No. 9 (April 14, 1980). Fred Archer: 632-9876.

Union Proposal Prohibiting the Expansion of the Area of Consideration Ruled Nonnegotiable

In the instant case, the Federal Labor Relations Authority ruled that a union proposal, which prohibited the expansion of the area of consideration for filling unit vacancies if five "in-house" candidates within the area were rated qualified was nonnegotiable.

The Authority, in agreement with agency management, held that this proposal would require management, where there are five or more qualified candidates in the minimum area of consideration, to select from among those five or more individuals or not to select at all. The proposal, thus, would limit the agency's discretion to select from other appropriate sources to those situations where the minimum area of consideration yields fewer than five persons. This, the Authority concluded, would prevent the agency from exercising its right to select within the meaning of §7106(a)(2)(C), which protects management's right, in filling vacancies, to make selections for appointments from among properly ranked and certified candidates for promotion, or from any other appropriate source. The National Council of CSA Locals, AFGE, AFL-CIO and the Community Services Administration, Case No. 0-NG-127, 3 FLRA No. 13 (April 28, 1980). Fred Archer: 632-9876.

Limitation on Assignment of Supervisory Duties Ruled Nonnegotiable

The Federal Labor Relations Authority held recently that the right to assign work to positions within the agency includes the right to decide when and to whom such work will be assigned. Accordingly, the Authority found nonnegotiable a union proposal which would have prohibited assignment of other than clerical and routine administrative duties to the clerical assistant to the office manager, except in the absence of the office manager and unless the clerical assistant was officially appointed acting office manager. In the Authority's view, this proposal conditions the agency's right to assign work to the clerical assistant and thus violated 5 U.S.C. §7106(a)(2)(B). National Labor Relations Board Union, Local 19 v. National Labor Relations Board, Region 19, Case No. 0-NG-131, 2 FLRA No. 98 (March 7, 1980). Fred Archer: 632-9876.

Union May Not Negate Internal Security Practices of Agency Rules FLRA

The Authority held recently that a union proposal in response to an agency's decision to require all employees to wear identification cards/badges interfered with management's right under §7106(a)(1) to determine the internal security practices of the agency. The union's proposal, which would have required the elimination of the ID cards requirement with respect to certain employees or, in the alternative, severe restrictions on their use, clearly conflicted with management rights since the visible display of ID cards/badges is an essential part of the agency's internal security practices. The Authority rejected the union's contention that its proposals were only procedures concerning how the identification cards/badges were to be carried. American Federation of Government Employees, AFL-CIO, Local 15 and Department of the Treasury, Internal Revenue Service, North Atlantic Region, Case No. 0-NG-137, 2 FLRA No. 109 (March 14, 1980). Fred Archer: 632-9876.

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Volume 2, No. 1, October 1980

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In Brief is published quarterly by the Office of General Counsel, Office of Personnel Management, for the purpose of informing agency General Counsels and their staffs of the latest developments in federal personnel law. The publication sets forth matters before the Merit Systems Protection Board and the Federal Labor Relations Authority. In addition, **In Brief** follows significant personnel matters in the Federal Courts. Material concerning issues/cases before the FLRA is supplied by the Office of Labor Management Relations of the Office of Personnel Management.

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United States Office of Personnel Management

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MSPB Cases

Decided Cases

Attorney Fees

Standards for Awarding Fees

The MSPB recently decided four basic issues relating to payment of attorney fees.

First, it considered the conditions which authorize an award of fees under the Board's general appellate jurisdiction in 5 U.S.C. §7701. Section 7701(g)(1) allows payment of fees which have been incurred when the appellant is the prevailing party and the award is in the interest of justice. Based on this statutory provision the Board held that it has broad discretion in determining whether an award of fees is appropriate. However, it recognized that Congress did not intend fees to be granted in every case and that the appellant has the burden of establishing that he or she is entitled to fees. Although the Board did not define the precise scope of its discretion, it provided some examples of the types of cases in which a fee award would be appropriate. These examples include cases where the agency: (1) engaged in a prohibited personnel practice; (2) took an action that was clearly without merit; (3) acted in bad faith; (4) committed a gross procedural error; or (5) knew or should have known that it could not have prevailed on the merits.

Second, the Board considered the availability of fees in cases where the appellant was not directly charged for the legal services. Section 7701(g)(1) restricts payment of fees to those cases where the fees were "incurred" by the employee. The Board concluded that a fee award is permitted, in appropriate cases, where the appellant is not charged for legal services (e.g. where appellant is represented by union counsel). However, an attorney- client relationship must exist and the fees must be incurred on behalf of the appellant.

Third, the Board discussed the relationship between the two provisions of title V that authorize payment of attorney fees - §7701(g) and §5596(b)(1)(A)(ii). The Board held that fees can be paid under §7701(g) only in those cases which fall within its appellate jurisdiction. Thus, §7701(g) does not allow payment of fees in cases brought by the Special Counsel or in cases involving a Board challenge to an OPM regulation or an agency's implementation of the regulation. In these cases fees can be awarded under §5596, if an action was taken against the appellant which resulted in a loss of pay. However, the Board concluded that both the "interests of justice" standard and the "incurred" test, which apply to fees awarded under §7701(g), should also be applied to fee requests maintained under §5596.

Fourth, the Board considered the calculation of the fee award. The Board held that the fee award must be a reasonable one. Thus, presiding officials are required to carefully examine the billing rates and hours claimed by the appellant's attorney and must articulate the basis for the amount of fees awarded. In light of this holding, it is essential that agencies also scrutinize requests for fees and, if appropriate, challenge the amount of the fee claimed.

Perhaps the most significant aspect of the decisions is the obligation imposed on an agency to fully investigate any charge brought against an employee, including any defense or argument raised by the employee, and to litigate its case competently. Thus, the Board indicated that the failure to conduct a thorough investigation and to present an effective case may be evidence of the agency's ill

will and/or negligence which may result in an award of fees. Allen v. United States Postal Service; Kling v. Department of Justice; Frazier v. Hall; O'Donnell v. Department of the Interior; Wells v. Harris. Emily Marwell: 632-4600; Ann Allen: 632-5421.

Adverse Action

Grade and Pay Retention

The MSPB recently issued a decision holding that an employee who is reduced-in-grade as a result of a reclassification action, and who thus becomes entitled to grade and pay retention benefits, is not subjected to an adverse action under 5 U.S.C. §7512.

The appellants were twenty-five employees of the Department of the Army who were serving in positions which had been reclassified downward under a new classification standard issued by OPM. The appellants could not be reassigned to other positions at their grade levels. Thus, the Department informed them that they would be downgraded and that, under the Civil Service Reform Act, they were entitled to grade and pay retention benefits. The American Federation of Government Employees filed appeals on behalf of the twenty-five appellants challenging the reclassification action.

The Board was required to resolve two issues in this appeal. First, the Board considered whether 5 U.S.C. §5366 eliminated adverse action appeal rights for employees receiving grade and pay retention benefits. Section 5366 provides that the "action" which forms the basis for entitlement to grade and pay retention is not appealable, except as specified in that section. (Section 5366 authorizes a classification appeal to OPM and a reduction-in-force appeal to the Board). The Board agreed that the term "action" referred to the continued assignment of an employee to a position which had been reclassified at a lower grade and not the reclassification of the position. It also relied on the legislative history of the applicable provisions in finding that Congress intended to eliminate all appeal rights from actions affecting both the position and the employee, except as specified in §5366.

The Board next considered the question of whether employees reduced-in-grade are constitutionally entitled to a hearing, even if they are receiving grade and pay retention. The Board held that §5366 does not impair the constitutional rights of employees because an employee entitled to grade and pay retention receives a substantial benefit which is not available to other employees. Further, the Board noted that all employees who are reduced-in-grade as a result of a reclassification "may still vindicate their statutorily granted rights through a classification appeal directed to OPM." Atwell v. Department of the Army. Lydia Parnes: 632-5423.

Demotion

The MSPB has held that an employee who is awarded a position as a result of a successful discrimination complaint cannot be demoted in the event that the prior incumbent of the position is successful in an adverse action appeal. Appellant had filed an EEO complaint successfully challenging the appointment of a Mr. Miller to a GS-7 position. To afford relief to the appellant, Miller was demoted and appellant given the position. Miller filed an adverse action appeal and his demotion was reversed because the agency failed to show that his promotion was based on race and/or sex.

The agency then demoted appellant in order to cancel Miller's demotion. In this appeal, the Presiding Official found that the agency was compelled to demote appellant from the GS-7 position so that Miller could be returned to it. However, he reversed on the ground that the agency had failed to show that it was precluded from taking some action which was less severe than demotion.

The MSPB found that appellant's demotion did constitute an adverse action appealable to the Board. Further, it noted that "the phrase 'such cause as will promote the efficiency of the service' as a standard of job protection does not authorize a demotion of an employee simply because an agency selected a particular course of action to implement the cancellation of another employee's personnel action."

Having two employees who were required to be in GS-7 positions, the agency had to use its discretion to treat both fairly. In effect, the agency was required to assign both employees to GS-7 positions because the demotion of appellant did not promote the efficiency of the service. Quinney v. Department of the Army. Sandra Shapiro: 632-4902.

Employment Practices

Time-In-Grade

An MSPB Presiding Official has held that the time-in-grade regulations, 5 C.F.R. §300.601, are not an appealable employment practice under 5 C.F.R. §300.101 et seq.

Appellant was appointed from a register to the position of GS-4 clerk-typist. She was later promoted, under the agency's merit promotion plan, to the position of GS-5 Customs Inspector. However, she alleged that, due to a previous series of temporary appointments as a GS-5 Customs Inspector, she should have had eligibility for an immediate appointment at GS-7.

The Presiding Official found that the policy of limiting time-in-grade credit to the grade level of the permanent competitive appointment held by an employee is valid. This policy prevents entitlement to competitive status in high graded jobs through a "back door" route.

The Presiding Official also found that the appellant had not met her burden of establishing the Board's jurisdiction. He noted that "because the time-in-grade restrictions are not intended to be job-related or to measure the relative ability of candidates for positions, but rather to prevent excessively rapid promotions, the undue growth of the bureaucracy, and to enable agencies to make annual budget plans that accurately forecast salary costs, the restrictions are not considered employment practices which are appealable to the Board." Beeson v. Office of Personnel Management. Gail L. Goldberg: 632-7790.

Pending Cases

Adverse Action

Nexus

The primary issue raised in this case is whether a sufficient nexus exists between the appellant's conduct (driving while intoxicated) and his position (school bus driver) to support an adverse action. The appellant was arrested when he was found asleep in his car on the side of a state highway and was charged with possession of a vehicle while intoxicated. He pleaded guilty. Subsequently, his Government operator's permit was revoked and he was removed from his position as a school bus driver for "conduct unbecoming a Government employee, including driving while intoxicated." Further, without his operator's permit he was unqualified to perform the duties of a motor vehicle operator.

The Presiding Official found that the agency had failed to (1) support by a preponderance of the evidence its charge that the appellant had been driving while intoxicated; (2) establish a nexus between such conduct and the appellant's position; and (3) show a valid basis for the revocation of the appellant's operator's permit.

OPM intervened and argued that "driving while intoxicated, or even being in possession of a vehicle while intoxicated, are wholly incompatible with the responsibilities of a school bus driver and the agency's concerns for the safety of its students. Such conduct, even while off-duty, reflects negatively on appellant's judgment, and as a result, reasonably lowers the agency's opinion of appellant's reliability and trustworthiness. This result, without more, may be held to impair the efficiency of the service."

OPM further argued that any exculpatory facts surrounding the police incident were irrelevant to resolving the nexus question but should be considered in determining whether the discipline imposed was appropriate. Hendricks v. U.S. Department of Interior. Emily Marwell: 632-4600.

READEX FICHE

Disparate Penalty

OPM has argued in a recent case that a disparate penalty, in and of itself, does not require reversal of an adverse action. Penalties for like offenses need not be uniform if an agency, in its discretion, gives weight to the different mitigating factors present in each individual case. An agency may evaluate such varying factors as length of service, attendance, past performance, and employee attitude in selecting an appropriate penalty. The objective in applying a penalty should be to fit the discipline to the circumstances. Indeed, if an agency was required to woodenly impose the same disciplinary action in every case having similar circumstances, it would remove all judgment and discretion from the agency decision and paradoxically, render it arbitrary.

In addition, OPM argued that a Presiding Official's examination of other past personnel actions taken by the agency is tantamount to an evaluation of the agency's personnel practices. Such an examination is not only outside the Presiding Official's authority, but also imposes upon the agency the additional burden of having its personnel practices subjected to general scrutiny if it chooses to defend its selection of penalty in an individual case. Fuller v. Department of the Treasury. Ann Wilson: 632-5421.

Selective Enforcement

An issue analogous to that presented by the cases involving disparate penalties was presented in two cases involving misuse of a Government vehicle. Appellants challenged their 30-day suspensions, arguing that because the agencies had not taken action on a similar set of facts in the past, they were forever foreclosed from taking that type of action in subsequent cases.

OPM noted that 31 U.S.C. §638a imposes a statutory penalty of a minimum 30-day suspension for misuse of a Government vehicle. There can be employee misconduct associated with the use of an official vehicle, however, that does not rise to the level of a statutory violation. An agency must maintain the discretion to determine whether culpable misuse has occurred under 31 U.S.C. §638a. Once that determination has been made, the agency must apply the required statutory penalty. It is thus inappropriate to compare the instant cases to earlier ones where the agencies found no culpable misuse under the statute. Martinez v. Defense Logistics Agency. Ann Wilson: 632-5421.

Standard for Review of Penalty Selected by an Agency

In one case the principal issue raised is whether an agency must justify a penalty by a preponderance of the evidence.

Appellant, was removed from his Postmaster position on the basis of four charges. The Presiding Official found that three of the four charges were supported by a preponderance of the evidence. However, he reversed the removal, holding that the agency failed to establish by a preponderance of the evidence that the appellant's removal would promote the efficiency of the service.

OPM has argued that, although the CSRA does not specify a scope of review to be utilized by the MSPB, it is clear that Congress intended the Board to rely on the abuse-of-discretion criterion when reviewing penalty. In adopting the preponderance standard for misconduct cases, Congress understood that it was codifying the standard previously used by the Civil Service Commission. The Commission, however, did not apply the preponderance standard in considering the propriety of a particular penalty but rather reviewed the penalty only to determine whether its selection represented an abuse of the agency's discretion. Hence, it must be assumed that Congress intended to continue reliance on the abuse-of-discretion standard in reviewing penalty. Rasmussen v. United States Postal Service. Lew Fischer: 632-4518.

In another case, the MSPB is considering whether the preponderance of the evidence standard applies to review of an agency selected penalty. Appellant was removed for unsatisfactory performance. The Presiding Official reversed the removal on the ground that the agency had failed to establish that "the penalty imposed for the employee's actions is just."

OPM reiterated its position that an agency's selection of a penalty is discretionary and should stand unless arbitrary or capricious or a clear abuse of discretion. OPM argued that the

preponderance of the evidence standard was intended only to be applied to factual issues and not the appropriateness of a penalty. Peterson v. Department of Energy. Ann Wilson: 632-5421.

Can Selection of a Penalty be a Prohibited Personnel Practice?

The central issue presented in this case is whether an agency's selection of a penalty may constitute a prohibited personnel practice under 5 U.S.C. §2302(b)(11), if the penalty is disproportionate to the offense. Appellant was removed for failure to comply with an order and absence without authorization. He alleges that the penalty was so disproportionate to the offense as to constitute a prohibited personnel practice.

OPM has intervened to argue that an agency's choice of penalty cannot constitute a prohibited personnel practice under 5 U.S.C. §2302(b)(11). OPM argued that 5 U.S.C. §2301(b)(8), which prohibits arbitrary action, refers only to actions taken for partisan political reasons. Even if §2301(b)(8) is applicable, however, it only applies if the employee proves bad faith or gross negligence on the part of the agency. A good faith mistake in judgment does not suffice to establish a violation of a merit system principle. Hall v. Department of the Air Force. Lydia Parnes: 632-5423.

Removal for Failure to Meet Financial Obligations

OPM has intervened to respond to an MSPB request to address "the issue of the effect of 5 U.S.C. §2302(b)(10) on the 'efficiency of the service' standard where an appellant is removed for non-payment of debts." OPM argued that 5 U.S.C. §2302(b)(10) does not expand the current definition of "efficiency of the service" but rather codifies existing case law construing that standard. Such case law already contemplates a showing of a "nexus" or connection between the basis for agency action against the employee and the effect on employee performance or the ability of an agency to perform its function.

In this case, the agency received 16 debt complaints on appellant from different creditors. Appellant acknowledged the debts and made arrangements for payment but failed to honor those arrangements. Under Executive Order 11222 employees are "expected to meet all just financial obligations." Moreover, several courts have held that where an employee has acquired a number of debts, the agency has made attempts to work out the matter equitably and the situation has not improved, dismissal does promote the efficiency of the service. This is particularly true in light of the fact that federal salaries are not subject to garnishment for commercial debts and using federal employment to defeat creditors reflects badly on the federal service as a whole. Byars v. Department of the Army. Lew Fischer: 632-4518.

Change in Status of Postal Clerk from Full-Time Regular to Part-Time Flexible

The MSPB has reopened a decision to consider whether a reduced number of hours (below 40) for a postal clerk whose status was changed from "full-time regular" to "part-time flexible" renders that status change a "reduction in pay" under 5 U.S.C. §7512.

Appellant initially served as a part-time flexible clerk. He was changed to full-time regular status when a vacancy became available. However, when another employee won a grievance and was returned to full-time clerk status, the complement of full-time clerks became overfull. Thus, the appellant was returned to his former part-time flexible schedule.

After unsuccessfully grieving his return to part-time status, appellant appealed to MSPB arguing that the loss of a guarantee of 40 hours work per week constituted a reduction in pay under §7512 and consequently was an adverse action taken without procedural protections. The Presiding Official found that the mere possibility of a reduced number of hours did not constitute a reduction in pay.

OPM has intervened to argue that a status change would constitute an adverse action only if the employee suffered a loss of pay. Postal Service records indicate that appellant has worked at least 40 hours in every week except two since his status change. During those two weeks appellant's hourly rate, which is higher as a part-time flexible employee than it

was as a full-time regular employee, has resulted in pay which exceeds what appellant would have earned as a full-time regular employee.

OPM also noted that the Postal Service and appellant's union have entered into a collective bargaining agreement which required the change in appellant's status. This agreement also provided a grievance procedure which appellant used. Thus, OPM maintained that the MSPB lacked jurisdiction over the appeal. The appellant should not be afforded "two bites at the apple", which would frustrate the results reached according to the terms contemplated by the parties to the collective bargaining process. Swarick v. United States Postal Service. Bob Moll: 632-7600.

Appointment

Necessity to Serve Probationary Period

The MSPB has been asked to consider whether a clerical error by an agency on a personnel form, that was corrected within four days, provides a probationary employee adverse action rights upon removal.

The agency issued a Standard Form 50, Notification of Personnel Action, when it hired the appellant. Although the selecting official had indicated her intent that appellant serve a probationary period, the box on the Form indicating a required probationary period was not checked. Four days later the agency issued a corrected SF-50 to appellant which indicated in two separate ways that appellant was required to serve a probationary period.

Appellant was subsequently removed and appealed that action to the MSPB. The Presiding Official held that she was entitled to full adverse action rights because, due to the clerical error, she did not have to serve a probationary period.

OPM filed a brief arguing that the appellant had notice of her probationary status. Appellant was hired off a Civil Service Register and, as a general rule, employees hired in this way are subject to a probationary period. Additionally, she was informed at her initial interview that the previous incumbent was removed during her probationary period. Moreover, appellant was handed a corrected SF-50 after four days on the job. Therefore, OPM argued, appellant was aware of her probationary status.

OPM also argued that the agency's clerical error was harmless. Appellant did not show that she had relied on the first SF-50 to her detriment, or that the four day lack of official notice of her status prejudiced her rights in any way. Therefore, this harmless clerical error should not result in a reversal. Rinehart v. Department of Health, Education, and Welfare. Allison Wolf: 632-4518.

Grade and Pay Retention

Effective Date

A case presently before the MSPB raises the issue of the effective date of the grade and pay retention provisions of the CSRA. On January 9, 1979, an Air Force employee signed a form voluntarily requesting a change to a lower grade. The form stated that the change would be effective January 14, 1979. Appellant asserted that he was entitled to "saved pay" under pre-CSRA law, on the ground that his grade change was an administrative proceeding pending on the effective date of the CSRA, and thus exempted from CSRA coverage by the Act's savings provision.

It is OPM's position that the signing of a request to change to a lower grade is not an "administrative proceeding" within the meaning of the savings provision. The grade and pay retention provisions of the Act contain their own effective date. This is the relevant date for determining whether these new provisions apply to a particular personnel action. Mathis v. Department of the Air Force. Ann Allen: 632-5421.

Performance Related Actions

Use of Chapter 75 Prior to an Approved Performance Appraisal System

The issue in this case is whether an agency can remove an employee for unacceptable performance using the adverse action procedures of 5 U.S.C. Chapter 75 prior to establishing an approved performance appraisal system.

Subsequent to the decision in Wells v. Harris (In Brief, Vol. 1, No. 2), the Board remanded this case to the Presiding Official to determine whether the agency had an approved performance appraisal system and, if not, whether the agency had justified the action by a preponderance of the evidence as required by Chapter 75. On remand the Presiding Official found that the agency had sustained its charges against appellant and that the removal was taken for such cause as would promote the efficiency of the service.

OPM intervened to argue that the MSPB's decision in Wells v. Harris makes it clear that an agency can take Chapter 75 actions until it establishes an approved performance appraisal system under 5 U.S.C. §4302. Drew v. Department of the Navy. Ann Wilson: 632-5421.

Prohibited Personnel Practices as an Affirmative Defense

The MSPB has been asked to consider whether the existence of a prohibited personnel practice standing alone constitutes an affirmative defense to an adverse action under 5 U.S.C. §7701(c)(2)(B).

Appellant had been removed for unacceptable performance and the Board remanded his appeal to the Presiding Official to reconsider in light of Wells v. Harris. The Presiding Official determined that the agency did not have an approved performance appraisal system required by Wells. However, he concluded that the agency had sustained its decision by a preponderance of the evidence as required under Chapter 75.

Appellant has requested reopening arguing that any agency conduct which can be characterized as a prohibited personnel practice mandates reversal of an agency action associated with that conduct. OPM has intervened to argue that §7701(c)(2)(B) mandates reversal of a personnel action only if that action is based on a prohibited personnel practice. The Civil Service Reform Act was designed to prevent reversal of agency actions due to technical violations. Thus, the fact that a prohibited personnel practice has occurred constitutes an affirmative defense only for an individual who has suffered injury because of a prohibited personnel practice.

OPM further argued that under Parker v. Defense Logistics Agency (In Brief, Vol. 1, No. 3), the burden is on the appellant to establish an affirmative defense, i.e., to show that the result would have been different had the prohibited personnel practice not occurred. Because the agency sustained its burden under Chapter 75, the appellant was not injured by any agency action and thus the removal should be sustained. Gonzales v. Department of the Treasury. Ann Wilson: 632-5421.

Federal Court Litigation

Adverse Actions

Loss of Premium Pay

The loss of premium pay under 5 U.S.C. §5545(c)(2) does not constitute a "reduction in pay" so as to entitle an employee to adverse action procedures. Plaintiff, a former criminal investigator for DEA was reassigned to a position in which there was no opportunity to earn premium pay. He alleged that the Federal Personnel Manual exclusion of premium pay under 5 U.S.C. §5545(c)(2) from adverse action procedures while requiring adverse action procedures for loss of such pay for firefighters under 5 U.S.C. §5546(c)(1) is arbitrary.

The court found significant differences between premium pay for firefighters and for criminal investigators. The former are required to spend large amounts of time at the station on standby status while for the latter overtime is occasional, irregular and for brief periods.

The court further held that DEA properly reassigned plaintiff to a less stressful position due to his manic-depressive illness. His condition resulted in hyperactivity and disorientation. The court concluded that this was a proper ground for reassignment to a job that did not require carrying or use of weapons. Moreover, although his condition was correctable through medication, the medical officer properly considered the safety of the public over plaintiff's premium pay. Triponi v. United States, Court of Claims No. 55-78 (July 16, 1980). Allison Wolf: 632-4518.

Compensation

The Administration of Wage Areas Under the Prevailing Wage System

The District Court for the Northern District of Mississippi has upheld OPM's broad discretionary authority to administer the Federal prevailing rate pay system under 5 U.S.C. §5343(a).

The case involved OPM's approval of a special pay system for Park Service employees on the Natchez Trace Parkway. In 1972, Congress established the prevailing wage system, under which Federal blue collar wages are to be consistent with prevailing rates for comparable work in the private sector for the same locale. OPM has established "wage areas" in which wage surveys are regularly conducted to determine local prevailing rates and to establish Federal wage schedules. Where insufficient private sector positions exist in a wage area, the nearest similar wage area will be used for comparison purposes.

The Natchez Trace Parkway encompasses several wage areas; employees often live and work in separate wage areas. Because their pay was set according to their "home" wage area, but they could be assigned to work anywhere along the 465-mile Parkway, employees working side-by-side often were paid at different rates. To remedy this, OPM approved a special pay plan under which Park Service employees are paid the highest wage for their grade which is payable in any of the Parkway wage areas.

Plaintiffs, Department of Defense employees, contend that the special pay plan discriminates against them because Park Service employees who live in plaintiff's wage area are paid at higher

rates. In granting summary judgment in favor of the government, the court held that the special pay plan does not arbitrarily and capriciously discriminate against plaintiffs. The court further held that the procedures followed by the Federal Prevailing Rate Advisory Committee (FPRAC), in developing the pay plan, did not deprive plaintiffs of due process of law.

The court also held that, because the notice and hearing requirements of the Administrative Procedure Act do not apply to matters relating "solely to the internal personnel rules and practices of an agency," the FPRAC was required only to comply with the procedural requirements of the Federal Advisory Committee Act. Under that law, FPRAC meetings are to be open to the public, with opportunity for oral or written statements from interested persons, unless the meeting is specifically authorized to be closed. Carlton v. Brown, N.D. Miss., No. EC 78-194-K-P (March 13, 1980). Allison Wolf: 632-4518.

Excepted Service

Employment of Handicapped Persons in the Excepted Service

The United States District Court for the District of Columbia has granted summary judgment to the Government in a class action challenge to the excepted service status of severely handicapped employees appointed pursuant to 5 C.F.R. §213.3102(u).

Plaintiff, a deaf former employee of NASA, was terminated during a reduction-in-force. As an excepted service employee, he had no right to compete for retention with employees occupying competitive positions. Plaintiff claimed, however, that handicapped employees appointed under excepted authority should be treated no differently than employees in the competitive service.

The Court rejected plaintiff's arguments. It noted that handicapped employees have reasonable access to the civil service via competitive procedures. In fact, many handicapped individuals working for NASA entered the service under competitive procedures. Thus, an excepted appointment was viewed as an additional avenue into the civilian service.

Similarly, the court rejected plaintiff's 5th Amendment due process claim, noting that excepted service employees have no property interest in their positions. The court also ruled that plaintiff had not been denied equal protection of the laws because the special hiring program was supplementary to, and not in lieu of, competitive service entry into the civil service.

Finally, the court held that 29 U.S.C. §791, which requires affirmative action plans for hiring handicapped individuals, does not require that the affirmative efforts result in competitive service employment. In making this finding, the court noted that such a requirement "would undermine the purpose of the competitive service." The court rejected plaintiff's contention that the defendants violated 29 U.S.C. §794 (providing procedures and remedies for violations of 29 U.S.C. 791) because of the absence of a 29 U.S.C. §791 violation. Shirey v. Campbell, U.S.D.C. D.C. No. 78-2817 (August 29, 1980). Bob Moll: 632-7600.

In a similar case, the United States Court of Appeals for the Eighth Circuit reached a contrary conclusion. The Court held that a mentally retarded employee, also serving under an excepted service appointment, could not be summarily terminated.

The court agreed that the employee had no property interest in his position. However, it concluded that "in the narrow factual circumstances of this case", no rational basis existed for granting non-retarded custodial laborers competitive service protections without affording these same protections to mentally retarded custodial laborers. An important factor in the court's decision was its belief that retarded persons have no meaningful access to the civil service via competitive procedures. Moreover, the court intimated that competitive procedures for these low level positions were unjustified in that they erected an "unnecessary barrier" to the employment of retarded persons. Fowler v. United States, 8th Cir. No. 79-1588 (September 10, 1980). Bob Moll: 632-7600.

Performance Related Actions

A Reference is Not A Performance Appraisal

A supervisor's response to inquiries from a potential employer regarding an employee did not constitute a formal performance appraisal. Plaintiff had alleged that references given by his supervisor injured him in obtaining subsequent employment. He further alleged that such references violated the Performance Rating Act, 5 U.S.C. §4301. (1978).

The district court found that the supervisor had acted within the scope of his employment and dismissed the petition for individual relief. On appeal, the Court of Appeals held that "nothing in the Performance Rating Act can be construed to prevent a supervisor from responding, orally or otherwise, to inquiries made by prospective employers about a supervised employee." The court noted that such references are a long accepted practice and do not constitute formal performance ratings. "To subject such reference requests or responses to the notice and hearing provisions of the Act would be to create a burlesque out of a necessary and proper personnel practice--and out of an Act of Congress." Burton v. Lobdell, D.C. Cir. No. 79-1556 (June 30, 1980). Lydia Parnes: 632-5423.

Retirement

Access to Medical Records

The Court of Claims held that it was not prejudicial error for an agency to wrongly inform an employee's physician that he could not release medical records to the employee when such records were in fact available at the FEAA hearing.

Plaintiff's agency filed an application with the then Civil Service Commission (CSC) for an involuntary disability retirement based on the diagnosis of two physicians that she was paranoid and, therefore, unfit for duty. Pursuant to 5 C.F.R. §831.1202(b), her medical records were released to her designated physician. Her physician was erroneously told he could not release them to her. In fact, such release is within the discretion of the personal physician. Federal Personnel Manual Supp. 831-1 (1969). The court found that this error was cured at the FEAA hearing where plaintiff's counsel was able to cross-examine both physicians who had made the diagnosis.

The court also held that it was not improper for the agency physician, Dr. Haynes, who had not examined plaintiff, to make a determination of unfitness based on the reports of the two examining physicians. Since CSC and not the agency makes disability determinations, Dr. Haynes' finding did not prejudice the final decision but only constituted advice to the employing agency. The disability retirement was affirmed. Fitzgerald v. United States, Court of Claims No. 26-79 (May 28, 1980). Bob Moll: 632-7600.

Labor Relations

No Private Right to Injunctive Relief in ULP Case

The District Court for the Northern District of California recently held that 5 U.S.C. Chapter 71 does not allow direct access by private parties to the courts to enjoin unfair labor practices.

The NFFE alleged that the agency had engaged in an unfair labor practice in violation of 5 U.S.C. §7116(a)(5), by refusing to bargain over the impact of a proposed reduction in force. It petitioned the Court for injunctive relief to require the employer to bargain on this issue. Both the agency, and the Authority, (which had intervened in the case), moved to dismiss the petition on the ground that the Court lacked jurisdiction. They argued that the statute: (1) vests exclusive jurisdiction in the Authority to consider in the first instance all unfair labor practice charges directed at Federal agencies,

with judicial review in the circuit courts of appeals; and (2) gives the Authority the sole right to apply to Federal district courts for injunctive relief to restrain unfair labor practices by Federal agencies.

The Court held that 5 U.S.C. Chapter 71 provided the exclusive procedures by which a union could seek relief for an agency's alleged refusal to engage in impact bargaining. The Court observed that the Authority alone was empowered by the law to investigate, prosecute and resolve unfair labor practice disputes. Moreover, the role of the courts within the statutory framework was closely circumscribed by Congress. That role is limited to (1) judicial review of final orders of the Authority; (2) judicial enforcement of such orders; and (3) injunctive relief in unfair labor practice cases, on petition from the Authority once it has issued its complaint.

The Court also concluded that Congress intended the described procedures to be exclusive. Judicial determination of rights under this law would be contrary to the congressional will. Thus, Congress designated the Authority, and not the courts, to police labor management relations in the Federal government under special procedures designed to meet special governmental needs. National Federation of Federal Employees, Local 1263 v. Commandant, Defense Language Institute, West Coast Branch, et al., N.D. Calif. No. C-79-2952-WHO (April 21, 1980).

Cases before FLRA

Decided Cases

Performance Standards

Establishment of Performance Standards and Critical Job Elements

The FLRA recently issued two major decisions concerning management's duty to bargain over performance appraisal systems. The Authority addressed a variety of issues of importance to agencies in the establishment and operation of such systems.

First, the Authority held that the establishment of performance standards and the identification of critical elements are directly related to management's reserved rights to direct employees and to assign work, and are thus non-negotiable matters. The Authority reasoned that these management rights are exercised through supervising, determining the quantity, quality and timeliness of work production, and setting priorities for work accomplishment. The establishment of performance standards and the identification of critical elements are among the ways in which management supervises and directs the work required of its employees.

The Authority held, however, that agencies must negotiate over criteria against which the application of performance standards to employees will be judged. The Authority held further that agencies have a duty to bargain on the procedures which will be used in exercising management's reserved rights and on appropriate arrangements for employees adversely affected by such exercise. It noted that, for example, agencies must negotiate over the procedures by which critical elements are identified and performance standards are set; the process by which such elements and standards are communicated to employees; and the frequency of performance appraisals, if more than once a year.

Second, the Authority held that proposals which differ from Government-wide regulations are negotiable so long as they are not incompatible or irreconcilable with such regulations. Thus, a union proposal which defined the terms "performance standards" and "critical elements", but which included only part of the regulatory definitions of those terms, was held negotiable, since it was not inconsistent with the regulations. The Authority noted that the regulation would, of course, govern on those aspects of the definition excluded from the union's proposal.

Third, the Authority discussed representation rights which apply during the performance appraisal process. The Authority noted that an exclusive bargaining representative has the right to be present at formal discussions which take place between management and employees about the performance appraisal system. Moreover, an employee who is examined in connection with an investigation into his or her performance and who reasonably believes that the examination may result in disciplinary action may request representation during that interview.

Finally, the Authority noted that employees who are subjected to a performance-based action may appeal the action to the MSPB or grieve it under a negotiated grievance procedure. The Authority held that employees may grieve the application of a performance standard. However, it did not address the question of whether the establishment of a performance standard, without more, could be challenged through the grievance process. National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, Case No. 0-NG-56, 3 FLRA No. 119 (July 31,

1980); American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., Case Nos. 0-NG-177-2 through 5, 3 FLRA No. 120 (July 31, 1980). Stuart M. Foss: 632-9876.

Negotiability

Outside Employment, Prohibited Personnel Practices and Merit System Principles

The FLRA has determined that a proposal to establish the criteria for use in reviewing applications for outside employment of IRS employees is negotiable.

The Authority rejected the argument that the matter of outside employment is not a condition of employment because it does not directly concern the employment relationship. It did note that an IRS regulation set forth the agency's policy regarding outside employment by IRS employees. However, the Authority found that the proposal would not restrict management's right to discipline a unit employee who failed to apply for or obtain permission to hold outside employment or who refused to terminate such outside employment. Moreover, even if management's rights were involved to some degree, the Authority concluded that the proposal was clearly procedural in nature and thus a mandatory subject of bargaining under 5 U.S.C. §7106(b)(2).

The FLRA also held that proposals to incorporate the prohibited personnel practices and the merit system principles into a collective bargaining agreement were negotiable. Nothing in either the language or the legislative history of CSRA indicated that Congress intended to exclude such matters from the coverage of the negotiated procedure. Although §7121(c) specifically excluded certain excluded certain matters from coverage, matters concerning merit system principles and prohibited personnel practices are not so excluded. Moreover, the definition of "grievance" in 5 U.S.C. §7103(a)(9) includes a complaint concerning any claimed violation of any law affecting conditions of employment. The matters in dispute were clearly encompassed by this definition and thus the union proposals were within the scope of the negotiated procedure "for the settlement of grievances" under 5 U.S.C. §7121, unless the parties excluded them through the collective bargaining process.

Finally, the Authority rejected the agency's argument that the proposals were nonnegotiable because they might apply to persons outside the bargaining unit (including applicants for employment who are not "employees" within the meaning of the statute). It noted that the statute itself provided procedures for challenging grievances which a party had reason to believe were nongrievable or nonarbitrable, as a matter of law or for other sound reasons, including having such contentions reviewed by the Authority. National Treasury Employees Union and Internal Revenue Service, Case No. 0-NG-82, 3 FLRA No. 112 (July 23, 1980). Stuart M. Foss: 632-9876.

Employee Parking Spaces

The FLRA has held that an agency must negotiate over a proposal concerning the release of unneeded or underutilized parking spaces, even though this issue is addressed in a government-wide regulation issued by GSA.

The Authority held that GSA's Federal Property Management Regulations are government-wide regulations since they apply to the Federal civilian workforce as a whole and are binding on the Federal officials and agencies to which they apply.

Under these GSA regulations, agencies are required to relinquish to GSA unneeded or underutilized spaces. However, agencies are allowed to exercise their discretion in determining whether the space is unneeded or underutilized.

The IRS had determined that it would no longer provide pre-paid parking spaces for employees who use their personal vehicles in connection with official business. Further, it refused to negotiate over a proposal which would have prohibited the release of these spaces to GSA.

The Authority concluded that the union proposal was negotiable. As long as a regulation does not specifically preclude

an agency from exercising its discretion through negotiations, that discretion can be so exercised. Accordingly, the Authority held, an agency's discretion in deciding whether portions of its space are unneeded or underutilized may be exercised through negotiations.

The Authority also concluded, however, that a proposal requiring the agency to provide parking free of charge was inconsistent with a Government-wide regulation and was thus nonnegotiable. National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, Case No. 0-NG-11, 3 FLRA No. 118 (July 30, 1980). Stuart M. Foss: 632-9876.

Official Time for Union-Sponsored Training

Proposals authorizing official time for union-sponsored training are negotiable. The union submitted a proposal which would have authorized unit employees to spend eight hours per year for education, union members an additional 16 hours per year for advanced grievance training, and unlimited excused leave for officers and stewards to attend union-sponsored training off premises. Management rejected this proposal as nonnegotiable arguing that it failed to meet the criteria for authorized training established by the Comptroller General.

The Authority found the union proposal to be negotiable. The Authority concluded that the decisions of the Comptroller General neither contained a specific prohibition nor placed an absolute limit on the amount of official time authorized for union sponsored training. Rather they left it to each agency to determine if the training would benefit the agency and established broad guidelines for agencies to use in granting such leave to afford reasonable flexibility to accommodate their particular circumstances.

One section of the proposal provided benefits to union members only (an additional eight hours per year for grievance and other training). The Authority held that this section of the proposal violated 5 U.S.C. §7114(a)(1) which required the exclusive representative to represent the interests of all employees in the unit without regard to labor organization membership and without discrimination. Thus, this proposal was not within the duty to bargain. National Federation of Federal Employees, Local 951 and Department of the Interior, Bureau of Reclamation, Mid-Pacific Regional Office, Sacramento, California, Case No. 0-NG-146, 3 FLRA No. 128 (July 31, 1980). Stuart M. Foss: 632-9876.

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